IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 188....

NO. 387.

THE CITY NATIONAL BANK OF FORT WORTH, AND JOHN DAWSON,

vs.

R. D. HUNTER, A. G. EVANS AND M. P. BUEL, PARTNERS UNDER THE FIRM NAME OF HUNTER, EVANS & CO.

Brief of

A. S. LATHROP, *Solicitor of Appellants.*
LEAKE & HENRY.

WILMANS BROTHERS,
Book, Brief, Commercial and Fine Art Printers.
DALLAS, TEXAS.

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Appellants.
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Appellees.
No. 387.

BRIEF OF APPELLANTS.

This suit was begun in the District Court of Montague county, State of Texas, by petition filed on the 31st day of May, 1880. In this petition R. D. Hunter, A. G. Evans and M. P. Buel, partners under the firm name of Hunter, Evans & Co., citizens of the State of Missouri, were plaintiffs and John A. O'Neal and John Dawson, citizens of Texas, were the sole defendents.

O'Neal, when sued, resided in Van Zandt county and Dawson in Tarrant county, and it was so alleged in the petition. R. 2.

Both defendants were served with process in the State court, and the defendant filed in the State court his answer

consisting of a general demurrer and various defenses. R. 23.

Article 1,962 of the Revised Statutes of Texas reads:

"The defendant, in his answer, may plead as many several matters, whether of law or fact, as he shall think necessary for his defense, and which may be pertinent to the cause; *provided*, that he shall file them all at the same time, and in due order of pleading."

The venue of suits in the District courts of Texas is fixed by Art. 1198 of the Revised Statutes which provides that:

"No person who is an inhabitant of this State shall be sued out of the County in which he has his domicil except in the following cases to wit:"

Here follows 23 exceptions of which only the 5th and 11th have any relation to the question of venue in this suit. The 5th exception reads:

"Where a person has contracted in writing to perform an obligation in any particular County, in which case suit may be brought either in such County or where the defendant has his domicil. The 11th exception reads:

"Where the suit is for the foreclosure of a mortgage or other lien in which case suit may be brought in the County in which the property subject to such lien or a portion thereof may be situated."

Plaintiffs in their petition claimed to have a lien upon a certain stock of cattle then in the possession of John Dawson in said County of Montague, which lien they charge existed by virtue of a mortgage given them upon said stock of cattle by the defendant John A. O'Neal. R. 2.

The defendant John A. O'Neal appeared first in the State court pleading to its jurisdiction by a sworn plea alleging:

1. Residence of himself in Van Zandt county and of Dawson in Tarrant county.

2. That he never undertook or promised in writing, or

otherwise, to pay plaintiffs any debt in the County of Montague.

3. That the stock of cattle against which plaintiffs sought to enforce a lien nor any part thereof were at the time of the institution of suit nor prior thereto situated in the said County of Montague, but that the same was en route for market with the consent of plaintiffs, and were never at any time situated in said County of Montague.

4. That defendent at the date of the institution of this suit did not have any interest in or right to said stock of cattle or any part thereof and that long before the institution of this suit and before the levy of the writ of sequestration herein this defendent had with the consent of plaintiffs sold and delivered said cattle to defendant John Dawson and received payment from him therefor and paid plaintiffs the money so paid him. R. 22, 23.

The plaintiffs at the time of filing their petition aforesaid sued out a writ of sequestration by virtue of which the sheriff of Montague county took into his possession the property described in the petition and writ to-wit, 1478 head of cattle of the aggregate value of $15,614.00.

These cattle were replevied by the defendant Dawson on the 2nd day of June, 1880. R. 8.

On the 21st day of June 1880 plaintiffs sued out of the District court of Montague county a supplemental writ of sequestration directed to Van Zandt county, under which was seized by the Sheriff of said County 450 head of cattle. Of these cattle Defendant O'Neal replevied 21 head valved at $110. The remainder of them were replevied by plaintiffs, Hunter, Evans & Co. R. 12-13-14-15.

The cause was on the 28th of December, 1880, on the peti-

tion of the plaintiffs, removed into the United States Circuit Court for the Northern District of Texas at Dallas.

At the ensuing term of the United States court the record of the case was filed in said court, the plea of O'Neal to the jurisdiction being still pending.

On rule day in November, 1881, the City National Bank of Fort Worth, which had not been made a party in the State court, entered its appearance as a defendant in the Circuit Court. R. 3-9.

STATEMENT OF THE ORIGIN AND NATURE OF THE CONTROVERSY.

Hunter, Evans & Co., at the beginning of the year 1879, were engaged in the live stock commission business at East St. Louis, Illinois. R. 84.

At the same time the defendant John O'Neal was a stock owner and raiser in Van Zandt county Texas and was also engaged in buying and shipping cattle from different points in Texas.

In February, 1879, O'Neal and the firm of Hunter, Evans & Co. made an arrangement for O'Neal to buy and ship cattle to Hunter, Evans & Co during the year 1879. The firm of Hunter, Evans & Co. were to furnish money to buy the cattle with during the spring and summer of that year and O'Neal was to consign the cattle to them for sale at the National Stock Yards in East St. Louis. R. 84.

Such dealings were had under this arrangement that by the 20th day of August, 1879, Defendant O'Neal had become indebted to Hunter, Evans & Co. by open account for a considerable sum of money. R. 2, 42, 230.

Hunter, Evans & Co. as part of their arrangement with O'Neal agreed that O'Neal might draw drafts on them for money

which they would accept and pay. R. 85. These drafts were often drawn and paid without any shipment of cattle or other provision by O'Neal for their payment. R. 85.

Hunter, Evans & Co., according to their own statement, (R. 111) advanced O'Neal by paying his sight drafts and accepting his time drafts until they had advanced him in the aggregate about $47,000.

It was then that O'Neal executed the two notes for $11,000 each sued upon, and as a security for their payment executed to Hunter, Evans & Co. a bill of sale on his O N brand of cattle, further described as being his home (Van Zandt county) stock of cattle. R. 111 and 53.

The said notes were not executed as new or absolute obligations, but only as a convenient means of giving security for the indebtedness due by O'Neal as aforesaid, and Hunter, Evans & Co. on the same day and as part of the same transaction, executed and delivered to O'Neal a defeasance showing that when O'Neal paid his account both the notes (three in all) and the bill of sale should be cancelled. R. 56.

This mortgage was never properly recorded, and there is no evidence in the record that it was. R. 214, 53.

The property remained in the possession and control of O'Neal.

On April 29, 1879, an act of the Legislature of the State of Texas took effect, the first section of which contains the provision:

"Every chattel mortgage * * which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the property mortgaged or pledged by such instrument, shall be absolutely void * * as against subsequent purchasers and mortgagees or lien holders in good faith, unless such instrument or a true copy thereof shall be forthwith deposited with and filed in the office of the

County Clerk of the county where the property shall then be situated."

Appendix to Revised Statutes of Texas, p. 15.

The succeeding sections of this law regulate the manner of recording chattel mortgages.

The City National Bank of Fort Worth, when it took its mortgage on the same property subsequently had express notice of the said bill of sale to Hunter, Evans & Co. and of its character as a chattel mortgage.

After this dealings of the same character as before continued to be transacted between Hunter, Evans & Co. and O'Neal.

During this time and before the 10th of December, 1879, O'Neal in conducting his business with Hunter, Evans & Co. obtained money for the purpose of conducting it from the defendant, the City National Bank of Fort Worth, which monies were charged to O'Neal, and from time to time the debts so created were paid by drafts drawn on Hunter, Evans & Co., either by O'Neal himself or by William Hunter, the agent of Hunter, Evans & Co., then living in Fort Worth. All drafts so given were duly honored by Hunter, Evans & Co., except one draft, dated November 15, 1879 signed by O'Neal for $9,354.03, which was refused and returned unpaid to the bank. R. 186, 187.

On the 10th day of December, 1879, O'Neal, in order to settle his debt to the bank growing out of the non-payment of this draft, executed and delivered to the bank through its president, John Nichols, his note for $9,810.11, that being the amount of said draft and interest, and for the security of said note on the same date executed a mortgage on all his interest in his home stock of cattle, consisting of beeves two, three and four years old, cows, bulls, yearlings and calves, marked and branded as follows: "Branded O N on hip and

sides, and marked with swallow fork in each ear, subject to a bill of sale of the above described property to Hunter, Evans & Co., now on record in Van Zandt county, also of his home cattle branded H on hip and marked under slope in one ear and under half crop in the other, known as the John Howell mark and brand, and all of his cattle branded H on hip, I on shoulder and marked swallow fork in the left ear and under bit in the right, known as the Henry Fuller stock, and one hundred head of horses, mares and colts, branded O N on left shoulder."

This mortgage was recorded by the County Clerk of Van Zandt county 16th December, 1879. R. 187, 225, 226.

Besides the admitted fact that O'Neal had a general authority to draw upon Hunter, Evans & Co. and did so in favor of the City National Bank of Fort Worth, as well as others, and that all his previous drafts had been paid without objection,

A. M. Britton, vice-president of the bank, testifies: (R. 187.) "The reason for this line of credit being given to the said O'Neal by the City National Bank was that on or about the 17th day of March, 1879, O'Neal, in company with William Hunter, agent of Hunter, Evans & Co., came to the office of the bank and said to me, I being then its vice-president and in charge of its discounts and credits, that they wanted to make arrangements through the City National Bank for John O'Neal to buy cattle and ship them to Hunter, Evans & Co., at East Saint Louis, the said Wm. Hunter then and there agreeing, as agent of Hunter, Evans & Co., to guaranty the payment of any and all checks drawn against the bank by said O'Neal or his authorized agents He agreed at the same time to settle the account of O'Neal at any time by giving a draft on Hunter, Evans Co., in case said O'Neal was not in Fort Worth to give such draft himself. Relying

solely on said guaranty and not being willing to trust John O'Neal alone, I extended to them the credit asked." R. 187, 188.

"During the transactions with O'Neal under said agreement a great many drafts were drawn on Hunter, Evans & Co., some by O'Neal and some by said William Hunter, and were taken by the City National Bank and credited to the account of said O'Neal, all of which drafts were paid by Hunter, Evans & Co., except the last one, drawn on the 15th day of November, 1879, for $9,354.03.

"On the day that this (last mentioned) draft was made and delivered to the City National Bank, I was in the office of said William Hunter, and overhearing him use language calculated to throw discredit on said John O'Neal, I became uneasy about the payment of said indebtedness, and knowing that O'Neal intended on that day to cover his indebtedness to the bank by a draft on Hunter, Evans & Co., based on cattle then in the shipping pens at Fort Worth and about to be shipped to Hunter, Evans & Co., I asked Mr. Hunter if the draft proposed to be drawn by O'Neal would be paid by Hunter, Evans & Co, and whether or not I had better take a bill of lading to order, which would insure the payment of the draft, or hold the cattle, to which he replied that Hunter, Evans & Co. were obliged to pay the draft and would do it. Relying on this statement, I did not take the bill of lading, but allowed the draft to take its usual course, and I on that day left Fort Worth on a trip to Motley county, Texas, and was absent some weeks; hence I was not in Fort Worth when said draft was protested, nor present when the note and bill of sale were executed by O'Neal to the bank." R. 188–194.

This special undertaking by Hunter, Evans & Co. to pay the drafts drawn by O'Neal in favor of the City National Bank was denied at the hearing. R. 199.

This denial is predicated strongly on the fact that the bank took O'Neal's note secured by a mortgage made by him for the debt and did not attempt to hold Hunter, Evans & Co. liable for it. R. 129.

This the bank explained by the fact that the express promises by Hunter were made to Britton alone, who immediately left home without communicating the agreement to the other officers of the bank, and that Britton did not return until after O'Neal had settled with the bank by giving his note and mortgage, which transactions he had with other officers of the bank who had at the time no knowledge of such express agreement. R. 195, 214–215.

This was the status of all parties when early in the year 1880 John Dawson became connected with the transactions through his desire to purchase a part of O'Neal's cattle and drive them to a place outside of Texas to fill a contract of sale he had made with other parties to deliver cattle at the Pawnee Agency in the Indian Territory by the 20th day of June, 1880. R. 206, 207, 204.

Dawson, in Febraary, 1880 went to Van Zandt county, saw the cattle, saw O'Neal and agreed with O'Neal about the purchase of the cattle. R. 204.

Before this trade could be consummated so as to give Dawson a clear title and enable him to drive them to market it was necessary for him to have the consent of the lien holders.

Dawson then, and before he took further steps in the matter, consulted Hunter, Evans & Co. and the officers of the bank, and both agreed that O'Neal might sell him the cattle if things could be amicably arranged between all parties. R. 204.

Hunter, Evans & Co. referred him to William Hunter and Judge A. T. Watts, an attorney-at-law, of Dallas, Texas, as their agents in the matter. R. 204

On the 20th of March, 1880, there was a meeting of all the parties at Fort Worth, Texas, represented as follows:

O'Neal was represented by himself and his attorney-at-law, J. C. Kerby. Hunter, Evans & Co. by Wm. Hunter, their attorney in fact, and Judge Watts, their attorney-at-law. The City National Bank of Fort Worth by A. M. Britton and its attorney-at-law, Robt. McCart. R. 212.

Dawson alone, not being involved in the controversy about the property and expecting to get the title of all parties, does not seem to have had a lawyer.

O'Neal had the cattle and wanted to sell them for a certain price to pay his debts to Hunter. Evans & Co. and to the bank.

Dawson wanted to buy the cattle and was willing to pay O'Neal's price, provided he could get them free from the claims of Hunter, Evans & Co. and the bank, and be allowed to drive them to market in the Indian Territory.

It thus became proper and necessary for the parties to adjust at least for the purpose of Dawson's purchase, the following questions:

First, What was the amount of O'Neal's debt to Hunter, Evans & Co.?

Second, What was the amount of O'Neal's debt at the bank?

Third, Which had the prior lien, Hunter, Evans & Co. or the City National Bank, on the cattle being sold to Dawson, and how should the money paid by Dawson for the cattle be distributed between them?

The settlement of the third question depended primarily upon the settlement of the first and second. If they could be settled then the question of priority of liens alone would remain, and that priority could be announced by the lawyers, or failing a concurrence of opinion on their part, the parties themselves could compromise by pooling.

There was no dispute as to the amount of the bank's debt. It was a single transaction and the amount had been settled.

But there was a dispute about the amount of the debt of Hunter, Evans & Co, which dispute was between Hunter, Evans & Co. and O'Neal, and unless this dispute was sufficiently adjusted to remove the existing incumbrance from the cattle the transaction with Dawson could not be consummated, as he did not propose to purchase until claims against the cattle were satisfied.

The only object of this meeting being to enable O'Neal to sell part of the mortgaged cattle to Dawson free of the liens of Hunter, Evans & Co. and the bank, it was not absolutely necessary for every question as to the amount of their debt to be settled by Hunter, Evans & Co. with O'Neal.

It was only necessary for it to be agreed upon sufficiently for them to agree and express on what terms they would release their lien on the cattle being sold and delivered to Dawson. That much was necessary for Dawson's protection. How it was done was no concern of his.

Unless it was done clearly and bindingly he would not take the cattle, and a trade beneficial to all of said parties and evidently much desired by them would not be made. R. 204–212.

It was found that the question of priority of lien could be compromised by each lien-holder partaking of the funds in proportion to his debt, thus making the mortgages equal in standing.

This left it necessary to settle between Hunter, Evans & Co. and the bank for the purpose of this prorata distribution and without reference to the final liability of O'Neal, what amount of the debt of each should enter into the prorata distribution of the Dawson money. If the amount thus agreed upon did not exceed the amount of O'Neal's indebtedness, he

(O'Neal) would have no ground for complaint. But if the amount agreed to be pro rated to either did exceed O'Neal's debt to such one it would injure him by causing more of his money to be paid to such one than was really due him.

This necessity was met by an agreement between the three —Hunter, Evans & Co., the bank and O'Neal—that Hunter, Evans & Co.'s debt should enter into such distribution for such sum only as O'Neal admitted he owed them, Hunter, Evans & Co. and O'Neal agreeing further that the disputed amount between them should not be further prejudiced than the release of the Dawson purchase, and should be afterwards otherwise settled between themselves.

The bank debt, being undisputed, was to be recognized for its full amount.

This agreement solved every question in dispute so far as Dawson was concerned, and the parties proceeded with the aid of the lawyers present to put their agreements into writing in terms so plain that no trouble or dispute could afterwards arise. R. 212

"*McCart did the writing and Judge Watts dictated.*" R. 212.

At the time that these agreements were made the cattle were on their range, and before they could be consummated the cattle would have to be gathered, which would require both time and expense for both Dawson and O'Neal, and besides Dawson would be delayed, if not prevented altogether, from making purchases elsewhere to meet his contracts.

There were three different agreements in writing executed between the parties, some executing one and some another, on the 20th March, 1888.

The first one was between John M. Dawson, Hunter, Evans & Co. and the City National Bank.

The second was between John A. O'Neal, the City National Bank and Hunter, Evans & Co.

The third one was between John A. O'Neal and John M. Dawson.

The second one substantially recites that Hunter, Evans & Co. and the bank each hold written liens upon certain cattle to secure debts due them by O'Neal, and that O'Neal had sold said cattle to Dawson, wherefore Hunter, Evans & Co. and the bank agree to said sale, provided O'Neal shall on delivery of the cattle to Dawson surrender to Hunter, Evans & Co. and the bank the proceeds of said sale, they agreeing to receive the same in full satisfaction of their respective debts if the amount received shall be equal to the amount of their debts, but if it shall be less, then the bank and Hunter, Evans & Co. agree to receive such proceeds and credit O'Neal by pro rating them according to their respective undisputed demands, and if there be any deficiency O'Neal binds himself, at his own option, to pay the same with money, or with his note satisfactorily secured by deeds of trust, or other liens upon real or personal property in Van Zandt county. It is further agreed between said parties that should there arise any difference or trouble about the amount of the indebtedness of O'Neal to either of the other parties, "then the amount agreed to be due between the parties shall be adjusted, satisfied and discharged, as aforesaid, and the amount in dispute shall be secured by O'Neal as aforesaid, and when the parties of said disputed amount agree, or when the same shall be determined by suit, or arbitration, or otherwise, then said amount to be paid as hereinbefore stipulated, to-wit, from the proceeds of said sale or from the security furnished by the said O'Neal." If the proceeds of the cattle sold Dawson shall not be sufficient to discharge both debts, the deficiency

after being secured as above provided for "shall be carried, owned and held by and between said Hunter, Evans & Co. and the City National Bank, according to their respective claims," and collections shall be pro rated as hereinbefore provided for.

"It is further understood between the parties hereto that should this agreement from any cause whatever fail to be carried out and consummated, then no statement or recital herein shall be construed to be an abandonment of any right, lien or security held by any of the parties hereto."

"It is further agreed that should there be a deficiency, as heretofore referred to, then the said O'Neal agrees to secure said deficiency in manner as aforesaid by liens upon property owned by said O'Neal, real or personal, such deficiency to bear interest at the rate of 12 per cent. per annum from date and to mature on or before the first of January, 1881. This deficiency to be secured as above provided at the time said cattle are delivered over to said Dawson."

(This agreement will be found set out at large in the record pp. 228–229.)

The second agreement between Dawson, the bank and H. E. & Co. in substance recites the indebtedness of O'Neal to the bank and H. E. & Co. "in a large amount" and that ~~some~~ said creditors have liens on O'Neal's "home stock of cattle" to secure such indebtedness, and that O'Neal on same day has entered into a written contract with John Dawson for the sale and delivery of said cattle to Dawson by which "John Dawson is to assume the payment of said John O'Neal's indebtedness to Hunter, Evans & Co. and the City National Bank provided O'Neal shall deliver to Dawson at price agreed upon between Dawson and O'Neal enough to pay off said indebtedness."

"In the event that the cattle sold and delivered by O'Neal to Dawson shall be insufficient to pay off the full amount of

said indebtedness, the said Dawson binds himself to pay off said indebtedness pro rata to the extent of the cattle received by the first day of October, 1880."

It is further agreed that this sale is made subject to the liens of Hunter, Evans & Co. and the City National Bank and that said Dawson holds said cattle in trust for the said Hunter, Evans & Co. and the City National Bank of Fort Worth as stipulated in this agreement.

"It is further agreed that Hunter, Evans & Co. and the City National Bank shall together select a man to accompany said Dawson in driving said cattle from Texas to any point said cattle may be sold at, and the man so selected shall have the legal possession of said cattle and he shall receive the proceeds of the sale of said cattle from any and all purchasers of said cattle to the extent and amount of the indebtedness assumed by the said Dawson."

"It is further agreed that if the said Dawson does not sell said cattle by the first of October, 1880, Hunter, Evans & Co. and the City National Bank shall have authority to take possession of them, dispose of them and apply the proceeds thereof *pro rata* to said indebtedness.

(Said agreement is set out in full in the record, pp. 227-228.)

The 3d agreement (between Dawson and O'Neal) in substance recited the aforesaid debts and liens, and the aforesaid written agreements between the bank, O'Neal and H. E. & Co. and between the Bank, Dawson and H. E. & Co., and stipulated that therefore O'Neal in consideration of said agreements would gather and deliver to Dawson at or near Wills Point, Van Zandt county, Texas, his stock of cattle upon which said liens existed together with such other cattle as O'Neal might want to put into the trade and as would be acceptable to Dawson, stipulating the prices that Dawson was to pay,

which payments it was therein provided should be made by Dawson in such manner as the bank and H. E. & Co. should require to the extent of O'Neal's indebtedness to them as shown by the agreements aforesaid.

And if the price of the cattle more than discharged said debts it was therein stipulated that the excess be secured to O'Neal to be paid with interest from date at 12 per cent. per annum by 1st October, 1880.

It was furthermore stipulated that O'Neal should so deliver said cattle to Dawson by the 20th May, 1880.

(Said agreement is set out in full in the record, pp. 251-252.)

After the execution of the agreements O'Neal proceeded to gather and prepare the cattle for delivery to Dawson, and Dawson prepared to receive them. Dawson testified that for this purpose he, about the first of May, hired twelve hands at an average price of thirty dollars per month and boarded them, that he bought horses, wagons, and provisions, and went to Van Zandt county to receive the cattle. That he devoted his time from the 1st to the 22nd of May superintending the gathering, examining and receiving the cattle. That boarding his teams and other expenses incident to that particular business during that time cost him twenty dollars per day.

That he had a contract to deliver cattle at the Panco Agency in the Indian Territory between the 15th and 20th of June, 1880, and he intended to put the heifers and bulls received from the O'Neal contract into that delivery. R. 204, 205. O'Neal's expense in gathering the cattle for delivery was between $500 and $600. R. 235. On the 22nd of May, 1880, the gathering of the cattle contracted for by Dawson from O'Neal was completed.

On that day all of the parties assembled at Wills Point to complete the transaction.

John Dawson and John O'Neal were there in person, Hunter, Evans & Co. were there by their agent, Lewis Evans and their attorney-at-law Judge A. T. Watts. The City National Bank was there, J. G. Kearby was there also as attorney for John O'Neal. General Henry E. McCullough, the agent selected and appointed by the bank and Hunter, Evans & Co. to accompany the drive and receive from Dawson for them the proceeds of the sale of the cattle, was also there. R. 205, 100.

O'Neal had penned and delivered to Dawson on the evening of 22 May, 1880, about two miles west of Wills Point, 1741 head of cattle mostly in the O N brand. R. 100, and 247. The value of these cattle, at the contract price agreed to between O'Neal and Dawson, was $19,033.00.

Hunter, Evans & Co. claimed that O'Neal owed them about $18,000.00. O'Neal on that day (22 May, 1880) disputed all of said claims except $9,915.74. The admitted debt of the Bank on that date was $10,339.85.

These facts being ascertained Judge Watts, the attorney of Hunter, Evans & Co., wrote a note for Dawson to sign for the purchase money of the cattle. R. 198. The following is a copy of said note:

$19,033.00. WILLS POINT, Texas, May 22, 1881.

One day after date, for value received, I promise to pay to the order of Hunter, Evans & Co. and the City National Bank of Fort Worth, Texas, at Fort Worth, Texas, the sum of nineteen thousand thirty three dollars with interest, at the rate of ten per cent per annum, from date until paid. This note is to be paid according to the terms and stipulations contained in a written contract entered into by and between John Dawson, Hunter, Evans & Co. and the City National Bank of Fort Worth, and dated March 20, 1880.

(Signed) J. M. DAWSON.

It is endorsed with credits as follows:

Received on the within note thirty-four hundred and nineteen dollars ($3,419.) May 22, 1880.

(Signed) HENRY E. MCCULLOUGH, Agent.

Received on within note a draft drawn by Frank Houston for eighteen hundred and forty-two dollars payable on the 22 day of next month. May 25th, 1880.

(Signed) HENRY E. MCCULLOUGH, Agent.

R. 276.

After said note was signed by Dawson, it was delivered to Gen. McCullough, by direction of McCart and Judge Watts as attorneys respectively of the Bank and Hunter, Evans & Co.

Dawson the same date (22d May, 1880,) drove the cattle on the journey to the Indian Nation, through Wills Point, where the parties were then assembled from the point of their delivery two miles east of said town, to a point three miles west of said town, from which last named point Dawson returned to town and executed said note. R. 198.

In the meantime and on the day they were delivered to him, Dawson sold for cash $3,419.00 worth of cattle, and at the very time that he executed said note he paid McCullough said sum of money. R. 198.

Watts and McCart, then and there, with the aid of a banker, figured how Dawson's note should be prorated and ascertained that of said note the bank was entitled to receive $9-715.78 and Hunter, Evans & Co. the remainder $9,317.22, and Judge Watts himself, for Gen. McCullough's future information, entered the credit of $3,419.00 on the note. And both Judge Watts and McCart then instructed Gen. McCullough that of every $1000.00 paid him by Dawson he would send Hunter, Evans & Co. $482.52 and the bank $510.48. R. 199.

The $3,419.00 were then and there divided and paid over to said parties in that proportion. R. 110.

At the same time and in the presence of all parties, after O'Neal had delivered the cattle to Dawson and after Dawson had delivered his note therefor as aforesaid, McCart as the bank's attorney endorsed O'Neal's note to the bank with a credit of $9,715.78 on account of these transactions. R. 199.

McCart testifies, and in this respect is uncontradicted by any witness, that:

"When we—that is Judge Watts, Lewis Evans and myself—found out that the cattle gathered and delivered by O'Neal to Dawson amounted to only $19,033.00 which was not enough to pay the bank and Hunter, Evans & Co., I asked Judge Watts what we should do, for the cattle delivered were not sufficient to pay us both. I had the original written contract with me—the one executed 20th March, 1880, by John O'Neal, Hunter, Evans & Co. and the bank—and called his attention to that part of the agreement wherein O'Neal obliged himself that if he, O'Neal, failed to deliver cattle enough to satisfy both debts, then he, O'Neal, was to secure Hunter, Evans & Co. and the bank by giving deeds of trust or such other liens upon property as should be sufficient to pay such deficiency. I said that the cattle delivered having paid all of the bank's debt except about $630.00, that I for the bank was willing to let Dawson take the cattle, and I would run the risk of O'Neal's securing or paying the bank that amount. I said now is the time to stop the delivery and driving of the cattle if you are opposed to the delivery of them to Dawson without O'Neal securing us according to contract. Watts made no objection to complete and full delivery of the cattle to Dawson or to their being driven off by him. On the delivery of the cattle *and before they had been delivered* there was a dispute and wrangle between O'Neal, Lewis Evans and Judge Watts as to the true amount of indebtedness from O'Neal to Hunter, Evans & Co."

"Watts and Evans claimed that the debt was from $16,000 to $18,000, while O'Neal claimed that he only owed them $9,915.74.

"Dawson, after he signed his note, asked if everything was now all right and if he could go on with his cattle, and it was said to him by Judge Watts and myself *that the cattle were his and he could drive them to market.* It was fully understood that he was going to drive them through Northwest Texas and the Indian Nation to Kansas. The cattle delivered to Dawson were in the O N and other brands. R. 199, 200.

Gen. McCullough, the mutual agent, testified that the cattle were taken charge of by Dawson with the knowledge and consent of L. W. Evans and Judge Watts. The bill of sale was made by O'Neal to Dawson." R. 271.

The same witness testified that:

"Dawson started the cattle from O'Neal's pens on the 22nd of May 1880; moved them down some six or seven miles that evening, and on the 23d drove several miles, and we passed out of Van Zandt county on the 23d or 24th of May, 1880, intending to drive them to market at Caldwell, Kansas." R. 272.

After leaving Wills Point Dawson sold another lot of the cattle and received in payment therefor from Frank Houston a draft payable to Hunter, Evans & Co., addressed to Mulhall and Scaling of St. Louis for $1,842, for which McCullough entered the second credit as appears above on Dawson's note. R. 272.

McCullough sent this draft to Hunter, Evans & Co. and at the same time drew a draft upon them in favor of the City National Bank for its pro rata part of said payment, $939 88.

When this draft was presented to Hunter, Evans & Co. for their acceptance they declined to accept it." R. 284.

Hunter, Evans & Co. in fact appropriated the whole of this payment and never paid the bank a cent of it. R. 92, 116, 224, 225.

On the 2nd day of June, 1880, the cattle were seized at the suit of Hunter, Evans & Co., mentioned in the first part of this brief, by the Sheriff of Montague County, while being driven through said County to their destination but temporarily detained by high water. R. 281.

They were held by the Sheriff until the 5th of June, 1880. R. 281.

Dawson obtained their release by the aid of the officers of the City National Bank who furnished his securities. R. 218.

When Dawson sold the cattle afterwards he paid the amount of the note and interest into the City National Bank which has ever since held the same to await the result of this suit. R.218.

Dawson was dependent upon the bank for security to his replevin bond and necessarily had to give up the money and lose the use of the proceeds of the cattle to indemnify it for becoming his security R. 218.

PROCEEDINGS IN THE CIRCUIT COURT.

The Plaintiff having removed the case to the United States Circuit Court and the City National Bank having appeared as a party Defendant, both parties by leave of Court amended and repleaded.

Hunter, Evans & Co., Plaintiffs, averred in substance (R.42) that for a long time previous to the 20th day of August, 1879, they, as commission merchants and live stock dealers in East St. Louis, had been dealing with John O'Neal and that on said date O'Neal was largely indebted to them and was desirous of further advances from them whereupon O'Neal made

to Plaintiffs the two notes before described and at the same time executed to them said bill of sale which was duly recorded in said County of Van Zandt where said O'Neal then and still resides, and where said cattle ranged. That said bill of sale though absolute on its face was intended only as a security for said notes and another not involved in this controversy and such other balances upon account as upon settlement should be ascertained to be owing Plaintiffs by O'Neal. Plaintiffs at the same time gave O'Neal a defeasance of said bill of sale.

That Plaintiffs' dealings With O'Neal were such that on about the first day of February, 1880, O'Neal owed them $18 616.49 by account, for which amount said notes and bill of sale were held as security.

That Plaintiffs afterwards, on the — day of February, 1880, received from the Texas & Pacific R'y Co. on account of O'Neal $625, and on 22d May, 1880, from H. E. McCullough $1,668.38.

That on May 31st, 1880, O'Neal was indebted to Plaintiffs upon said two notes $16,919.38 R. 42, 43, 44.

That long after the execution of said bill of sale O'Neal claiming to have become indebted to the City National Bank of Fort Worth, then and now doing business as a National Bank by virtue of United States Statutes, at Fort Worth, in Tarrant county, State of Texas, and to secure the amount of said indebtedness executed to John Nichols, president of said bank, a mortgage upon the O N brand of cattle before mortgaged to Plaintiffs with some other cattle, subject to Plaintiffs' lien, of which all parties had notice. R. 44.

Notwithstanding Plaintiffs' lien was superior on the O N stock, the bank in February, 1880, when Plaintiffs were threatening to sue O'Neal, claimed that its lien was superior

to Plaintiffs' on said O N stock, and it threatened to litigate said question.

At that time the O N stock of cattle could not be gathered except at ruinous expense and great trouble.

Plaintiffs well knew that pending litigation about said cattle while running on the range said cattle would become worthless by straying off, being stolen and sold by other parties.

"*To avoid such litigation and expense and loss of the said cattle, your orators entered into two certain contracts or agreements dated March 20, 1880*, the two being in fact but one." R. 45.

(Next follows a statement of the substance of said agreements. R. 45–46.)

That pursuant to the understanding of all parties they met at Wills Point on May 22, 1880, when without notice to Plaintiffs and in their absence O'Neal delivered to Dawson at a point two or three miles south of Wills Point, 1741 head of cattle, all of the O N stock, of the value of $19,033, of which O'Neal sold at the place where delivered to him the value of $3,419 and paid the same to Henry E. McCullough, who had been selected by Plaintiffs and the bank to accompany the cattle, of which amount Plaintiffs received $1,668 38 and the bank received $1,842. That so soon as the cattle were delivered to him Dawson drove them six or seven miles northwest of Wills Point and returned to Wills Point. That thereupon for the first time O'Neal disputed over $8,700 of his indebtedness to Plaintiffs, thereby reducing their claim in the pro rata distribution of the Dawson note to $9,317.22. R. 46–47.

That thereupon O'Neal made to Dawson a bill of sale for said cattle, and Dawson executed his note to the Plaintiffs and the bank for $19,033, and Plaintiffs and the bank gave O'Neal a receipt for said amount. R. 47.

That O'Neal then failed and refused to secure in any way the disputed amount of Plaintiffs' claim against him, and failed and refused to carry out and consummate said agreements.

"*And thereupon the parties to said agreements were remitted to their original rights and liens, and the said agreements thereby became abrogated and were thereafter of no force or effect * * and from and after the refusal of the said O'Neal to secure said disputed amount of your orators claim, as stipulated in said agreements, your orators have ever treated said agreements as abrogated, abandoned and of no effect.*" R. 47.

That prior to March, 1880, O'Neal, Dawson and the City National Bank combined and confederated together to cheat, wrong and defraud Plaintiffs, for that at and prior to the execution of said agreements the said parties were in Fort Worth consulting together about said matter, and had partly prepared said agreements when they sought Wm. Hunter, one of your orators' agents, and proposed to him to enter into said agreement. Said agent immediately took the advice of your orators' attorney, A. T. Watts, who advised against making said agreement, on the ground that the lien of your orators on the O N stock was the prior lien, and that he was informed there were enough cattle in said brand to pay Plaintiffs' debt. That on this advice Plaintiffs refused to enter into said agreements and so stated to the bank, O'Neal and Dawson; whereupon the bank, O'Neal and Dawson had a private consultation *not heard by Plaintiffs*, after which O'Neal, in the presence and hearing of the other parties, represented to Plaintiffs that he owned a large number of cattle then running in the range in Van Zandt county, which were included in the bank's lien and not in Plaintiffs', quite or nearly sufficient to discharge his indebtedness to the bank, and that if Plaintiffs

would enter into said agreements said cattle should be embraced therein and included in the delivery to Dawson.

That these representations made by O'Neal were accepted and adopted by the bank and urged by it as an inducement for Plaintiffs entering into said agreements.

That Plaintiffs were not informed of the number, value or condition of said cattle not in the O N brand, which it was claimed were included in the bank's lien, and knew nothing of the facts with regard thereto, except as represented by O'Neal and the bank. R. 48.

That Plaintiffs, wholly relying on said representations and believing them to be true, were thereby induced to and did enter into said agreement with O'Neal, Dawson and the bank. Said representations were entirely false, fraudulent and untrue, and were known so to be by said parties at the time they were made by them—that they were knowingly made with intent to induce Plaintiffs to enter into said agreements. In fact, said O'Neal did not have or own anywhere any cattle other than said O N stock, except a very few head, not exceeding five hundred dollars in value, and some ten cows and calves of little value and mostly exempt from execution.

O'Neal and the bank well knew such to be the fact at the time said false representations were made by them. R. 48.

That O'Neal, the better to enable him to perpetrate said fraud and with intent to cheat Plaintiffs, had up to and at the time of entering into said agreements, frequently acknowledged to Plaintiffs that $16,300.00 of their claim against him was correct, and that he owed them that amount as shown by his own books.

That O'Neal promised to meet Plaintiffs, at Dallas, a few days after the date of said agreement and fix the amount of his said indebtedness. O'Neal failed and refused to meet Plaintiffs and postponed such settlement from time to time

until after the cattle were delivered to Dawson, when he for the first time disputed about $8,700.00 of Plaintiffs' claim. When O'Neal disputed $8,700.00 of plaintiffs' claim he said he owned a large number of cattle still on the range in VanZandt county, more than sufficient to pay said amount, and that they could be gathered in a few days. R. 49.

After the execution of said instruments between the parties, Plaintiffs' attorney, having begun the preparation of a deed of trust from O'Neal to secure said disputed amount, called upon O'Neal for a description of the property to be embraced by the lien, which O'Neal said it was impossible for him to give and that it would have to be obtained from Canton, fifteen miles distant.

O'Neal then and there proposed to pay Plaintiffs something over $4000.00 in addition to amount assumed by Dawson and insisted upon his proposition being submitted to Plaintiffs, O'Neal well knowing, that being Saturday, that no reply could be received before Monday and he then stated that if Plaintiffs declined said proposition, he would meet them in Wills Point on the following Wednesday and pay or secure said debt.

During all this time Dawson was very urgent asking that the papers which he was to sign should be prepared, and he signed said papers and left Wills Point knowing that O'Neal had not completed his part of said agreement.

Plaintiffs rejected the $4000.00 proposed and met O'Neal at Wills Point the following Wednesday when the proposed arbitration was postponed until Saturday on account of the absence of material witnesses, on which day the parties again met and O'Neal refused to proceed with the arbitration or to secure the disputed debt and stated that he had no property with which to secure said debt, and said that he owned only a very few cattle besides those he had delivered to Dawson, and he also

said that all of his property was mortgaged for much more than its value—that much of it was of doubtful title and then in litigation, and he asked Plaintiffs not to press him with a suit as he was insolvent and it would ruin him; to all of which Plaintiffs replied that they would take such course as they thought best to protect their rights. R. 50.

Plaintiffs charge that O'Neal was hopelessly insolvent when he delivered said cattle to Dawson. That after said delivery to Dawson he owned no other cattle except about 300 head of said O N stock not exceeding value of $3000.00 and included in Plaintiffs' bill of sale.

O'Neal well knew the falsity of his statements, and made them in furtherance of the combination aforesaid between him and the bank and Dawson to cheat Plaintiffs.

O'Neal's acts and representatives subsequent to the Dawson delivery were with the view of delaying Plaintiffs while Dawson hastily drove the cattle out of Texas, which Dawson was proceeding to do with the same fraudulent purpose. Plaintiffs relied on O'Neal's representations until he informed them to the contrary.

That all of the cattle delivered by O'Neal to Dawson belonged to the O N stock and were included in Plaintiffs' bill of sale, and he did not deliver to Dawson any cattle in the other marks and brands mentioned in the bank's mortgage.

That long after the execution of bill of sale to plaintiffs O'Neal, without the knowledge or consent of Plaintiffs, sold for about $3000.00 and converted the amount to his own use. *All of which tends to show the animus that characterizes the acts of O'Neal in the premises.*

Wherefore your orators say and charge that on account of the deceit and fraud of O'Neal, Dawson and the bank the said

agreements dated March 20th, 1880, were and are null and void.

That said Dawson while on the drive failed to account to McCullough for $218 of a certain sale made by him in disregard of the terms of said agreements. R. 51 and 52.

That while en route Dawson disposed of part of the O N stock in the absence of McCullough and received in exchange therefor about 30 head of yearlings of the value of $300.00 and was proposing to dispose of the said yearlings without accounting to McCullough when he was stopped by the levy of the writ of sequestration. R. 52.

That after Dawson replevied said cattle he sold them for $16,500.00 which he received and now holds. R. 52.

Plaintiffs pray a decree against O'Neal for the full amount of their said debt against him.

For a foreclosure of their lien against O'Neal, Dawson and the bank.

If mistaken as to their remedy they pray for a decree against Dawson and the bank for the amount of money coming to them from the proceeds of said cattle under and by virtue of said agreements and for general relief. R. 52.

DEFENDANT O'NEAL'S PLEADINGS.

O'Neal in addition to his plea to the jurisdiction relied upon his answer filed in the State Court.

After his death his administrator, Mary O'Neal, appeared. R. 83. She relied upon the pleading filed by her interstate.

O'Neal's answer contained a general denial which was allowable under the state practice and put Plaintiffs upon proof of their case. R 17.

He further answered that the notes declared upon by Plaintiffs if executed by him, were executed for the purpose alone

of securing a margin of credit from Plaintiffs and no other consideration passed from Plaintiffs to Defendant for the execution of said notes. R. 17.

That on 11th September, 1879 O'Neal shipped to Plaintiffs in St. Louis, as his commission merchants, for sale 122 head of cattle of the aggregate value $2,860.40 which were converted by plaintiffs to their own use and never accounted for to said Defendant. R. 17.

That part of the Plaintiffs claim is an item of $665.99 pretended loss on cattle sold for Defendant, but that Defendant is not chargable with such loss, because it was occasioned by Plaintiffs' wrongfully and without Defendant's knowledge, shipping a lot of his cattle East to market. R. 17.

That certain specified items of interest charged in Plaintiffs' account aggregating $2,164.69 are incorrect. R. 18.

That Plaintiffs' charge of $2,500, for a draft drawn by Wm. Hunter on Plaintiffs 24th June, 1879,

Also, the sum of $18,898.25, charged for drafts drawn on Plaintiffs by said Wm. Hunter on the 8th day of August, 1879, and,

Also, item of $652.52 for draft drawn by said Wm. Hunter on 5th December, 1879, are all incorrect, because Defendant never authorized said Wm. Hunter to pay any of said sums for the account of Defendant or anybody else, and he has never in any way ratified or authorized their payment by Plaintiffs. R. 18. That when said drafts were drawn and paid said Wm. Hunter was the agent of Plaintiffs and they were drawn and paid without the knowledge or consent of Defendant O'Neal. R. 18.

That the item of $111.50, date July 8, 1879 is incorrect for $100.

That the item of $102.50, claimed to have been paid to

shippers, beginning May 5, 1879, and closing December 3, 1879, is incorrect, because Defendant did not authorize the payment of the whole or any part thereof.

That item draft by Wm. Hunter, due August 28th, 1879, bills payable accepted $6,724.41 is incorrect, because Wm. Hunter was never authorized to draw said draft, nor were Plaintiffs ever authorized to pay the same. R. 19.

That Defendant claims credit for $400 paid to John G. Moore for four months' service, one-half of which Plaintiffs promised to pay. R 19.

That Defendant is entitled to credit of $9,317.22 on account of the sale of cattle to Dawson on 22d May, 1880, and the credit of said sum then by Plaintiffs to Defendant. R. 20.

That he is entitled to credit of $1,668.50 on account of payment made to Plaintiffs May 22, 1880, by John Dawson through H. E. McCullough. R. 20.

That he is entitled to credit of $1,842 on account of payment made Plaintiffs by John Dawson through H. E. McCullough on 26th May, 1880. R. 20.

That after the execution of said notes Defendant O'Neal shipped to Plaintiffs as his commission merchants to be sold by Plaintiffs in Saint Louis in due course of trade and for their highest market value a large number, to-wit: 7,868 head of cattle, worth $30 per head, and aggregating value of $23,644, which cattle were received and appropriated by Plaintiffs and for the proceeds of which Plaintiffs ought to be held to account. R. 21.

That Plaintiffs, for the purpose of cheating and defrauding Defendant O'Neal, sold a large number, to-wit: 3000 head to the Beef Canning Company of Saint Louis, in which company Plaintiffs owned a large interest, to-wit: three-fifths of the whole. That said cattle were sold to said company for less

than their real value and for less than they would have sold for in the St. Louis market, whereby Defendant was damaged $5,000. R. 21.

That Plaintiffs are estopped by their proceedings and acts aforesaid from maintaining this suit against Defendant O'Neal, who prays for an abatement of Plaintiffs' claims, for judgement for his own claims and for general relief. R. 21.

JOINT AND SEVERAL ANSWERS OF JOHN DAWSON AND THE CITY NATIONAL BANK. R. 67.

They charge the execution by O'Neal to the bank on 10th December, 1879, of his note for $9,810.11, secured by mortgage on his home stock of cattle branded H and O N, including horses, mares and colts.

That both Plaintiffs' and Defendant's bills of sale were unintended to be mortgages. R. 68.

That Plaintiffs had better means of knowing O'Neal's financial condition and the number and character of his stock than had the officers of the bank, and in all their transactions with him acted and relied on their own knowledge of him and his property. R. 69.

That it was at the special instance and request of Plaintiffs that the bank advanced O'Neal the money out of which his indebtedness to it grew, and Plaintiffs promised to pay the same. R. 69.

It is true that the bank threatened to institute suit for the purpose of testing the validity and priority of its own and Plaintiffs' liens. R. 70.

It is true that at the time the contentions arose O'Neal's cattle were running on their accustomed range in Van Zandt county, but they were not liable to stray or to be lost or stolen to any considerable extent, and they were safer and could have been protected there at less expense than in Montague

county, where a few days later they were caused to be seized at the suit of Plaintiffs. R. 70.

That Defendants believe that the motives that induced Plaintiffs to enter into said agreements were their knowledge that they had not in fact a debt against O'Neal of near the amount claimed by them and they had doubts about the validity as well as fairness of their transactions with him. And because the bank's lien included property not embraced in Plaintiffs' and because they knew they were primarily liable to the bank for the payment of its debt against O'Neal. (R. 71.) And because by entering into said agreements they would not only relieve themselves from responsibility for the bank's debt, and of a controversy with the bank as to the validity of their lien on the O.N brand of cattle, but they obtained an equal lien on valuable property that they had no lien upon before, and provided for the collection without loss of the uncontested part of their debt against O'Neal, without surrendering the disputed part. R. 71.

They deny that the reservation in said agreement, as to the effect of recitals therein, were intended to have the operation claimed by Plaintiffs, and they say they were intended to have no force, except the transactions then contemplated should fail to be consummated, in which case said agreements would have nothing to operate upon. Said agreements were intended to operate on the sale from O'Neal to Dawson, and not independently of it. And when afterwards on 22d May, 1880, said trade was perfected said agreements took final effect. R. 71.

Defendants then set out the terms and circumstances attending the execution of the various agreements at Fort Worth on March 20, 1879, and the labor and expense gone to and incurred by Dawson and O'Neal in gathering the cattle

and penning them at Wills Point for the purpose of finally consummating said agreements, and the various transactions at Wills Point on the 22d May, 1880, including the delivery of the cattle to Dawson and bill of sale to him by O'Neal for the cattle. The execution of Dawson's note for the cattle and its acceptance by Plaintiffs and the bank—the payments made on it by Dawson through McCullough and the acceptance and division of the first payment by the bank as well as the circumstances of the appropriation of the whole of the second by Plaintiffs. R. 71, 72, 73, 74, 77, 80, 81.

Defendants deny that the two agreements, one between O'Neal, the bank, and Hunter, Evans & Co., the other between Dawson, the bank, and Hunter, Evans & Co. both executed at Fort Worth on the 20th of March, 1879, are parts of each other in the sense that all of the provisions of one are provisions of the other, according to the legal rule that agreements between the same parties, about the same transaction, executed at the same time, are to be construed as one instrument, because they say said two agreements were not between the same parties, there being in each found one party wanting in the other and wanting one party found in the other. R. 74, 75.

The objects of the agreements were double. One was to sell the cattle to Dawson free from every lien before existing against them, and charged with a new lien or trust to be enforced through the agency of H. E. McCullough. The other was to provide for settlements between some but not all of said parties. R. 75.

Wherefore separate and distinct agreements were entered into each relating to separate and distinct obligations and purposes.

That the introduction of Dawson, a new party, and having no connection with previous transactions made necessary separate and distinct agreements. R. 75.

That statements in amended bill of the substance of the two agreements are in the main correct, but the interpretation and construction thereof as well as the inferences, deductions and conclusions of Plaintiffs are fallacious, and unauthorized.

That by said agreement of March 20th, 1879, and the subsequent execution thereof and the purchase of said cattle by Dawson the original liens of Plaintiffs and the Bank on the cattle sold Dawson were forever extinguished and said new lien substituted therefor. R. 75.

That Plaintiff knew before the delivery of said cattle to Dwason the exact amount of their debt that was disputed by O'Neal. R. 76.

That the haste charged by Plaintiffs to Dawson is explained by the fact that his object in purchasing the cattle was to make profit by selling them again and in fulfilling contracts of sale previously made by him which made it necessary for him to drive the bulk of said cattle out of the State as was knowu to Plaintiffs. That punctuality and dispatch were of material importance, and twelve days beyond the time of performance mentioned in said agreements had already elapsed to his injury.

Wherefore, having executed his part of the agreements and become the owner of the cattle, he at great labor, risk and expense, with the knowledge and consent of Plaintiffs, commenced to drive said cattle to their destination out of the State of Texas and through Montague county. R. 76.

Defendants charge that at the date of said delivery to Dawson, O'Neal owned a large number of cattle not included in the sale and delivery to Dawson which he was willing and then offered to deliver to Dawson upon the same terms and for

the same purposes that the others were deliveredto him, if the time required for their being gathered was allowed, but Plaintiffs, being satisfied, agreed that the cattle then gathered should be delivered. R. 77.

That at the time of said delivery to Dawson, O'Neal owned of the O N stock on the range in Van Zandt county, besides those delivered to Dawson, as many as 350 head of the value of $5,250, as Plaintiffs well knew, and which were seized a few days afterwards by a writ of sequestration wrongfully sued out by Plaintiffs. R. 78.

That at the date of said sale and delivery O'Neal was solvent and owned real estate sufficient, over and above every incumbrance upon the same, to pay more than said disputed debt of $8,500, and on the 22nd of May, 1880, he placed in the hands of his attorney his title papers for the same with instructions and for the purpose of his prepaaring a mortgage on said lands to secure the ultimate payment of the disputed amount when found due, but the execution of such mortgage was prevented by the demand of attorneys of Plaintiffs that such mortgage should include a power of sale for cash in ten days after the amount due was ascertained, which was declined by O'Neal's attorney because that was not required by the agreement and was arbitrary and unjust, and would lead to a sacrifice of the property. R. 78.

That O'Neal was anxious to give Plaintiffs security, and repeatedly offered to do so, but Plaintiffs, by their attorney and agent, always refused to take such security uncoupled with authority to foreclose in ten days, and they threatened, unless he submitted to their exactions, to immediately cause him to be sued and his property to be seized and sold, and itwas in reply to such demands and threats that the attorney of O'Neal, and not O'Neal himself, and not in his

hearing or with his knowledge, retorted that Plaintiffs could not accomplish anything by that course because O'Neal was insolvent and his property was mortgaged beyond its value, etc R. 78.

Said statements Plaintiffs could have easily ascertained to be a delusion by investigation and by examination of the records. They were not the cause of the failure of negotiations between Plaintiffs and O'Neal. The real cause of such failure was that Plaintiffs had conceived their purpose of seizing Dawson's property in a distant County, under circumstances that they believed would lead to its being surrendered to them rather than suffer the damages, delays and losses that they believed would otherwise be caused to Defendants. R. 79.

Defendants say it is true that for several days before the 20th March, 1879, Dawson and O'Neal were discussing the sale of said cattle to Dawson and it being found necessary to have consent of the officers of the bank, as well as Plaintiffs, conversations where held between O'Neal, Dawson, the officers of the bank and Plaintiffs agents, but nothing was at any time said or proposed by any of the parties with regard to deceiving, taking advantage of, or injuring in any way the Plaintiffs herein. And if O'Neal had any purpose, or in any manner, or by any means contemplated, intended, or tried to deceive Plaintiffs, or either of them, or to get any undue advantage such purpose was never communicated to either of these Defendants, and never came to their knowledge, but on the contrary they believed and had every reason to believe that O'Neal was acting and intending to act with the utmost good faith toward Plaintiffs. The only declarations made by O'Neal in their presence or that ever came to their hearing were that he intended to, and had the means of securing Plaintiffs all that he was justly oweing them. R. 81.

Defendants deny that previous to or at the date of said agreement the bank or its officers had any knowledge of the number, value or situation of the cattle owned by O'Neal further than O'Neal's statements to them. That neither said bank or any of its officers, or agents, ever at any time pretended or represented to Plaintiffs or either of them or to any agent of theirs that said bank or any of its officers or agents had any such knowledge; and they say it is not true that they or either of them deceived or caused to be deceived plaintiffs or either of them in any respect, but the fact is that Plaintiffs, even with the advice of their attorney were not convinced that their debt as it stood was secure. They did not enter into said agreements with unselfish motives merely to please the bank, but to better their own condition, and persisted in it after mature reflection and after they had seen the cattle sold by O'Neal to Dawson. R. 81.

Defendants deny all allegations charging them with collusion to get possession of said stock of cattle or to get said agreements executed before there was a final settlement between O'Neal and Plaintiffs. They deny that Dawson ever disposed of any of the cattle otherwise than as he was authorized to do by said agreements and as the owner thereof. R. 82. Or that he ever deceived McCullough in any respect.

That Plaintiffs failed to make the bank a party to their suit in the District Court of Montague county, and brought their suit in that county, where they knew none of the Defendants lived, and in a Court which they knew had jurisdiction neither of the property in controversy or of the persons of the Defendants, intending by reason of inconvenience to said Dawson and the want of pecuniary ability by the Defendants to prevent their replevying said cattle and to make them submit

to irretrievable damage or to a settlement on Plaintiffs' own terms.

Defendant Dawson charges that Plaintiffs, by their wrongful seizure of said cattle by the writ of sequestration damaged him in the sum of $5,000, for that relying on the acts and declarations of Plaintiffs he employed hands to drive and herd said cattle at an expense of $1000; that he incurred further expense, and was himself at great trouble and labor in driving said cattle from Van Zandt to Montague of the value of $1000; that at the time of their seizure in Montague he had said cattle contracted to be sold at a profit of $3000. And that he has been damaged by reason of the malicious suing out of said writ of sequestration in the further sum of ten thousand dollars, for which he asks punitory damages. R. 31.

On the 18th day of May, 1885, the Circuit Court entered its final decree in substance as follows: R. 285.

1. Overruling Defendant's exceptions to the jurisdiction of the Court.

2. Overruling defendant O'Neals plea to the jurisdiction based on the fact that none of the Defendants resided in Montague county when this suit was instituted, and said plea being heard and the evidence advanced in support of the same it was considered that said plea be overruled.

3. Deciding that Dawson's note be divided between Plaintiffs and the City National Bank pro rata, according to their actual demands against John A. O'Neal, and finding that on May 22, 1880, O'Neal was indebted to Plaintiffs $18,333.68, and to the City National Bank, $10,339.85, and that Plaintiffs were at said date entitled out of the Dawson note to $12,169.64, less the sums received by them of the proceeds of said note, to-wit: On May 22, 1880, $1,668.49; on May 26, 1880, $1,842. And decreeing that Plaintiffs recover of the

Defendant John Dawson and the sureties on his replevy bond, John Nichols, S. W. Lomax, W. J. Boaz, J. F. Ellis and W. Scott, the sum of $8,659.15 principal and the sum of $4,329.67 interest, making a total of $12,988.82, which bears interest from date of judgment at the rate of ten per cent. per annum and all costs of collecting the same, for which execution was directed to issue at the expiration of ten days from the date of the decree.

And further that Plaintiffs, having received $2,424.56 from cattle sequestered and replevied by them, of which sum the City National Bank is entitled to $1,311.50, it is decreed that the bank recover of Plaintiffs said sum for which execution may issue at the end of ten days.

It further apppearing that Defendant O'Neal replevied $110 worth of cattle sequestered on 20th July, 1880, it was decreed that Plaintiffs recover of Mary O'Neal, administratrix, W. G. Criswell, L. J. Bridges and F. C. Wells, sureties on replevy bond, $110 with interest at 8 per cent. per annum from July 20, 1880, and costs of collection, for which execution was directed to issue after ten days, the proceeds of said collection to be distributed pro rata between Plaintiffs and the bank,

It was further ordered that Plaintiffs recover of and from the estate of John O'Neal $4,613.81, and all costs of suit, less any sum that may be received by Plaintiffs from the execution to be issued against the sureties of said O'Neal as therein provided, to be paid in due course of administration.

In the meantime providing that the costs of suit be paid pro rata by Plaintiffs and the bank.

An appeal having been allowed them, the bank and Dawson gave bond and bring the case into this Court. R. 286, 287, 288.

They filed in the Court below and now assign errors as follows, to-wit: R. 289.

1. The Court erred in that it rendered a decree in favor of Plaintiffs against Defendant O'Neal for a greater sum of money than the evidence showed to be owing them by him.

2. The Court erred as to the City National Bank by allowing Hunter, Evans & Co. a larger interest in the Dawson note than the evidence justified. The evidence shows that Hunter, Evans & Co., knowing that O'Neal disputed a portion of their claim against him, consented, as a compromise and to avoid threatened litigation with the bank, to divide the proceeds of said note with the bank according to the amounts of their claims that were admitted by said O'Neal to be owing to them respectively. O'Neal admitted that he owed Hunter, Evans & Co. $9,915.74 and disputed the balance of their claim.

He admitted that he owed the bank $10,339.85. The note distributed according to this agreement would have made the bank's share $9,715.78 and that of Hunter, Evans & Co. $9,317.22. R. 199.

While the Court by its decree allows the disputed claim of Hunter, Evans & Co. to stand in the division of said note for the full amount claimed by Plaintiffs' $18,333.68, against the admitted amount of the bank's $10,339.85.

3. The Court erred as to the defendant John Dawson, inasmuch as that while the evidence shows that his purchase of the cattle was based upon positive written agreements between all parties by which the prompt payment of his note bearing interest at the rate of ten per cent per annum was provided for out of the proceeds of sales to be made by him of the cattle for which said note was given, Plaintiffs, while said Dawson was performing said agreement and was in no respect in default, violated the contract, wrongfully sued him and caused his cattle to be taken away from him, caused him delay and damage, and made it necessary for him to give a heavy bond

with security in order to regain possession of his own cattle. Dawson was only able to give such bond by selling the cattle after they were released and allowing an agent of the bank to collect and hold the purchase money to indemnify it for providing for him the sureties to his replevin bond.

The bank continues to hold the purchase money of the cattle for its own protection. The decree is erroneous because it allows Dawson no damages and condemns him and his sureties to answer for the value of his own cattle, and in addition, to pay interest at the rate of ten per cent. per annum for all the time the value of his cattle has been withheld from him by the wrongful acts of Plaintiffs. R. 282, 218.

4. The Court erred in overruling Defendant O'Neal's plea to the jurisdiction of the Court.

While Plaintiffs seem to hold that their disregard of Dawson's title to the cattle and of his right in every particular is consistent with the term of the agreement of March 20th, 1879 that positions is so untenable that it does not require refutation.

Before the decree in this case can be sustained, either as to the bank or Dawson, those agreements must be set aside; or if under them Plaintiffs had the right to decline to consummate the transaction at Wills Point on the 22d May, the ratification and execution of said agreements then instead of their annulment must be obviated.

The grounds of fraud alleged as inducing Plaintiffs to execute the agreement of 20th March, 1880, are first that the officers of the bank, Dawson, O'Neal and their attorneys when Judge Watts arrived and objected, for Plaintiffs, to the agreements retired and concerted and conspired to make certain false representations to deceive the attorney and agent of the Plaintiffs.

This charge is supported only by the evidence of Judge Watts that said parties retired and conferred together without being heard, and that immediately afterwards some of them made a false statement about the number of O'Neal's cattle.

That there was any such combination or collusion is emphatically denied by the oath of each and every one of said gentlemen.

What they conspired to do according to Judge Watts, was to say and make Plaintiffs agent believe that O'Neal had enough cattle outside of the O N brand to pay off the bank's debt. According to Judge Watts and Plaintiffs agent, William Hunter, they readily believed this statement, although it was false, and were induced by it to enter into these important agreements which they were up to that time objecting to.

Wm. Hunter, while testifying that Judge Watts objected to this agreement until this false statement was made and that it was the controlling inducement for their being executed, does not say by whom it was made.

Judge Watts testifies with more or less uncertainty about who made it, whether Kearby or O'Neal and whether ratified by Britton or McCart. On the other hand all of these witnesses deny that such a statement was made by anybody.

Kearby, McCart and Britton tesify they were not acquainted with O'Neal's cattle and could not knowingly and truthfully have made such a statement.

All the evidence shows that William Hunter and Plaintiffs other agents knew O'Neal's cattle. Hunter was a cattle man not a lawyer or banker, and was on the ground for the purpose of watching Plaintiffs interests. All the evidence goes to show that O'Neal had next to no cattle that were not in the O N brand and it is next to impossible that he could have made such a statement or that it would if made have been so readily accepted by William Hunter, or *the suspicious* Watts. Judge

Watts irreproachable character would justly and effectually repel any imputation of even the slighest want of candor. That reputation compels the conclusion that he is simply mistaken in what he heard.

What the other witnesses will not gainsay but will rather corroborate that O'Neal said is that he had cattle enough, *not excluding* the O N brand embraced in the two mortgages, to pay both debts.

The evidence will justify such a statement as a matter of honest belief. Take for this purpose even Plaintiffs statement of his admission that he owed them $16,000.00, that added to the bank's debt say $10,000.00, would make both amount to $26,000.00.

He delivered to Dawson cattle worth $19,000.00. The sheriff of Van Zant shortly afterwards found 247 head more on the range testified by two witnesses to be worth $15.00 per head which amounts to $3,705.00. O'Neal testifies without contradiction that he then had horses in the O N brand embraced by the bank's mortgage worth $3,000.00 making an aggregate of $25,705.00. With the strong probability that the sheriff did not find all of his cattle it cannot be fairly concluded that he was intentionally or materially untrue in making a statement that he had enough cattle embraced by the two mortgages to satisfy both creditors.

Another ground on which the charge of fraud was based was that O'Neal fraudulently misled Plaintiffs agents as to the amount of their claim he intended to dispute and that he finally disputed a larger amount than he had induced them to believe he would.

All of the evidence, including the agreements, shows that he did not state when the agreements of 20th March, were executed, what amount he would dispute. It was left indefinite

and open and if he was bound to admit as much as is now claimed or as much as $16,000.00 that, or some sum, might have been inserted in the agreement. Evidently it was not done because no amount of undisputed debt was then ascertained.

It the letter of O'Neal written sometime before admitting an indebtedness of $16,000.00 was binding or considered so that amount might have been named as undisputed debt. That no amount was named justifies the conclusion that the agreement was written as intended making the amount admitted by O'Neal when the cattle should be delivered the test.

It was claimed at the hearing, that as O'Neal had never before disputed above three thousand dollars that should be held to be the limit and that having finally disputed more than that the agreements should be held thereby abrogated as to all parties.

The testimony of Plaintiffs witness, Lewis Evans, shows that in December, 1879, O'Neal was disputing two drafts for $2,500.00 each or $5,000.00 drawn by Wm. Hunter. He always disputed several hundred dollars of interest and the New York shipment. The testimony of Lewis Evans shows that he then disputed all drafts drawn by Wm. Hunter (R. 99.) all the evidence including his $16,000.00 letter shows that he always disputed the drafts drawn by Wm. Hunter. These drafts amounted to much more than the sum finally disputed. (R. 96, 128, 131, 2 and 3.

These drafts drawn by Wm. Hunter seem to have been drawn by Hunter on his own responsibility, without O'Neal's authority. The best that Plaintiffs or Wm. Hunter claim about them is that he paid O'Neal's debts with the proceeds, but O'Neal claimed that he had a right to pay his own debts. He evidently knew nothing about his own accounts, or how much Wm. Hunter had been allowed to draw at his charge.

He repudiates any such right in the letter upon which Plaintiffs rely to charge him with over $16,000. R. 184.

Plaintiffs seek his permission to charge him with Wm. Hunter's drafts (R. 96) without getting it. He testifies that such authority never existed. There never was a time when he did not dispute the Wm. Hunter drafts, and they, if he had known it, bring his indebtedness much below the sum admitted by him on the 22d of May.

The only other charge of fraud is that O'Neal promised to give security for the disputed amount and failed to do so.

Why he failed, and whetner he had the ability to comply is the subject of much contradictory testimony found in the record.

Grant for sake of the argument that on the 20th March, 1879, O'Neal led Plaintiffs to believe that he would not dispute as much of their debt as he finally did, and that he promised to secure the disputed amount, and violated his agreement in both particulars.

What effect would that have on the final transactions? The only effect it could possibly have had would have been to excuse Plaintiffs from consummating said agreements.

When Plaintiffs met the other parties at Wills Point two months later, they then at least knew exactly what amount O'Neal disputed, and also that he had not secured the disputed amount.

If these things, or either of them, were material parts of the agreements they could have refused to proceed to consummate them; or, on the other hand, they could waive these conditions.

If such defenses existed, they were unquestionably warned then.

Dawson knew nothing about the existence of such conditions. R. 222.

Dawson received delivery of the cattle from O'Neal with Plaintiffs' knowledge. R. 236, 237.

He paid the agreed-upon purchase price for the cattle, which Plaintiffs accepted.

He received, with Plaintiffs' knowledge, an absolute bill of sale for the cattle.

He received an acknowledgment of payment from Plaintiffs and an assurance from them that, whatever was unperformed, his part of the transaction was finally completed.

Plaintiffs have taken the cattle from him, but have never restored or offered to restore his note or to compensate him for his outlay and damages.

Without doing that they take a decree against him for the value of his own cattle because he does not restore them to answer Plaintiffs' wrongtful seizure of them.

While the evidence may not clearly disclose how much short of $18,000 Plaintiffs' claim against O'Neal really fell. It does show that the dealings with him were questionable and suspicious. They first sought authority from him for their own agent William Hunter to draw money and contract debts in his name. He refused to grant such permission, and Plaintiffs and Wm. Hunter proceeded notwithstanding to charge him with many thousand dollars in that manner.

Plaintiffs being charged with the duty of causing the cattle consigned to them to be sold for the best price, sold them to a concern of which some of them were members and managers, and they thus became both buyers and sellers.

They charged him a high rate of interest and often compounded it at that.

If it be held that none of these things reduce Plaintiffs' demands, they certainly justified O'Neal in honestly calling them in question.

As between Plaintiffs and the bank the evidence fairly shows an original liability to the bank by the Plaintiffs for the payment of the bank's debt that may very well have caused them to be anxious to avoid litigation.

Dawson was in a situation to decline to deal at all unless all parties came to an agreement which he could understand and which would enable him to purchase, hold and dispose of the cattle.

Plaintiffs avoided such litigation with the bank by consenting to prorate with it the proceeds of the mortgaged property and induced it to surrender its claim.

They got possession of the bulk of O'Neal's property by consenting to receive payment of so much of their debt against him as he admitted to be just, with the privilege of contesting with him the disputed amount without jeopardizing or delaying the collection of the balance.

They got Dawson to assume payment of a large part of their debt, and actually to pay part of it, by inducing him to believe that the cattle he was purchasing were freed from all adverse claims.

They came into possession of money belonging to themselves and the bank in a few days after these transactions, and appropriated the whole to their own use, thereby perpetrating a fraud upon both Dawson and the bank, and followed that up by suing O'Neal for a settled debt, and by seizing arbitrarily Dawson's property in a Court without jurisdiction of the persons or the property and without notice to the bank or making it a party repudiated and put an end to deliberate and accomplished agreements.

They made agreements to avoid litigation, which would have been conducted on equal terms at the domicils of its adversaries.

Office Supreme Court U. S.
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JAMES H. McKENNEY,

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1888.

THE CITY NATIONAL BANK OF FORT WORTH,
AND JOHN DAWSON, Appellants.

vs.

R. D. HUNTER, A. G. EVANS AND M. P. BUEL,
Partners under firm name of
HUNTER, EVANS & CO., Appellees.

SAWNIE ROBERTSON,
Attorney for Appellees.

Basye Bros., Print 507 Main St., Dallas, Texas.

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BRIEF OF APPELLEES.

On May 31st, 1880 appellees, citizens and residents of St. Louis, State of Missouri, brought this suit in the District Court of Montague County, Texas, against John A. O'Neal, a resident citizen of Van Zandt County, Texas, and John Dawson, a resident citizen of Tarrant County, by which they sought to recover from O'Neal the sum of $16,919 30, the balance claimed to be due on two promissory notes executed by O'Neal to appellees; dated August 22, 1879, each for $11,000, with interest at 10 per cent per annum, the first due forty days after date, the other due sixty days after date. And also to foreclose a mortgage or written lien upon a certain stock of cattle

branded O. N. on hip and side and marked with swallow fork in each ear, and various other marks, given to secure the payment of said notes, alleging that fourteen hundred and seventy-eight head of said cattle, included in said mortgage, were then in the possession of said John Dawson in said County of Montague, and that they feared he would make use of his possession to waste the property and that he would remove the same from Montague County during the pendency of the suit, and they sought and secured the issuance of a writ of sequestration, by which the said cattle were seized by the Sheriff of Montague County on June 2, 1880. R. pp. 2-6. Dawson repleived the cattle. R. pp. 7–8. A supplemental writ of sequestration was issued to Van Zant County by virtue of which the Sheriff thereof levied on two hundred and forty-seven head of said O N cattle on June 28, 1880, of which eleven cows and ten calves were replevied by O'Neal, and one hundred and fifty-five head were replevied by appellees. R. pp. 9–15.

On June 24, 1880, John Dawson answered by a general denial only. R. 10.

On December 28, 1880, O'Neal answered by general demurrer, general denial and special answers; also demurrer to the jurisdiction of the court, based upon the ground that the petition showed that neither O'Neal nor Dawson were citizens of Montague county, and failed to show that the property upon which the lein was sought to be inforced, or any portion thereof, was situated in Montague county at the time the suit was brought: and also by plea in abatement based upon the same grounds. R. 16–23.

Defendant Dawson filed an amended original answer December 24, 1880. And on December 28, 1880, he filed

a motion to quash the affidavit and bond for sequestration. R. 23.

December 28, 1880, on petition of the plaintiff the cause was removed into the Circuit Court of the United States for the Northern District of Texas at Dallas. The record of the case was filed in said Circuit Court at the ensuing term, no action having been taken on O'Neal's plea to the jurisdiction.

The City National Bank of Fort Worth, not theretofore a party, on rule day in November, 1881, entered its appearance in the Circuit Court as a defendant. R. 39.

June 6, 1881, complainants filed exceptions to Defendant O'Neal's plea to the jurisdiction, which seems not to have been acted upon. And on the same day complainants filed exceptions to the answer of O'Neal and Dawson, which seems not to have been acted on. R. 36–39.

On September 30, 1881, complainants filed an amended bill. R. 42–66.

Alleging in substance that, towit: Twentieth day of August, 1879, O'Neal was largely indebted to complainants, who were then commission merchants and dealers in live stock in East St. Louis, and was then desirous of obtaining from them further advancements, and for that purpose executed to complainants the two promisory notes sued on, and at the same time gave them a bill of sale of his home stock of cattle, branded O N etc.; that though absolute in form the bill of sale was made to secure the two notes sued on (and a third not involved in this suit), and such other balances as O'Neal might be owing them on settlement, and at the same time they executed a defearance to O'Neal, etc. That in pursuance of the arrangement O'Neal continued to draft upon and to ship cattle to complainants for sale on commission. And that about

February 1, 1880, O'Neal was indebted to them in the sum of $18,616.49, which was the amount then due upon the said two notes. That complainants in February, 1880, received and collected $625 from the Texas and Pacific Railway company for O'Neal, and allowed as a credit, and on May 22, 1880, they received from H. E. McCullough the sum of $1,668.38, which was applied as a credit upon O'Neal's account, and on May 31, 1880; when this suit was brought O'Neal was justly indebted to them in the sum of $16,919.38.

That O'Neal, claiming to be indebted to the City National Bank of Fort Worth in the sum of about $9000, and to secure such indebtedness he executed a certain deed of trust, mortgage or written lein upon the said O N stock of cattle, besides other cattle, land and other property to John Nichols, the then president of said bank; that the same by its terms was given on the O N stock cattle subject to the bill of sale theretofore given to complainants. That in February, 1880, while they were urging O'Neal to pay their debt, the bank then claimed that it had the superior lein on the O N cattle, and threatened a litigation on that question with complainants. At that time the said cattle were running on the range in Van Zandt and adjoining counties, and could not then be gathered except at serious expense and great trouble. And pending any litigation was liable to become worthless by straying off and being stolen and sold by other parties. And to avoid that result they on March 20, 1880, entered into two written agreements of that date, being but part of the one and the same agreement. The first was seized by O'Neal, City National Bank and complainants, and in effect agreeing to a sale of all the O N cattle, and also all the other cattle of O'Neal's included in the mortgage to

Nichols by O'Neal to John Dawson, which sale had been agreed upon between O'Neal and Dawson. It was stipulated that at the delivery of the cattle, O'Neal was to deliver to complainants and said bank, the proceeds of the sale, *i. e.*, the paper of said Dawson, and contract of sale between O'Neal and Dawson, which was to be received by complainants and the bank in payment of O'Neal's indebtedness to them, provided it amounted to the sum of their claims, otherwise it was to be received as payment *pro tanto* upon their claims to be prorated according to the amount of said debts, and any balance to be paid or secured by O'Neal to the satisfaction of the creditor. Any disputed amount of O'Neal's indebtedness to either was to be secured by O'Neal to the satisfaction of the creditor on property situated in Van Zandt county, at the delivery of said cattle to Dawson. And when the disputed amount was fixed by agreement, arbitration, suit or otherwise it was to be paid out of the proceeds of said sale or from the security furnrshed by said O'Neal, and in the event said agreement from any cause was not carried out and consummated, then no statement or recital therein should be construed as an abandonment of any right, lien or security held by any of the parties thereto.

The other or second part of said agreement was signed by said bank, complainants and John Dawson, and was in substance that Dawson purchased said cattle subject to the liens of complainant and the bank, and that he assumed the indebtedness to them to the amount of the value of the cattle delivered to him by O'Neal. Dawson was to hold the cattle in trust for complainants and the bank, and to have the right to drive them to market and make sales thereof, but complainants and the bank were to select an agent or agents to accompany the cattle, and such agent or agents to have the legal possession thereof

and to receive from the purchasers thereof the proceeds of sales, etc.

That persuant to the understanding of all parties, they met at Wills Point on May 22, 1880, when without notice to Plaintiffs, and in their absence, O'Neal delivered to Dawson at a point two or three miles south of Wills Point, 1741 head of cattle, all of the O'Nneal stock, of the value of $19,033, of which O'Neal sold at the place where delivered to him the value of $3,419 and paid the same to Henry E. McCullough, who had been selected by Plaintiff and the bank to accompany the cattle, of which amount Plaintiffs received $1,668 38 and the bank received $1,842. That so soon as the cattle were delivered to him Dawson drove them six or seven miles northwest of Wills Point and returned to Wills Point. That thereupon for the first time O'Neal disputed over $8,700 of his indebtedness to Plaintiff's, thereby reducing their claim in the pro rata distribution of the Dawson note to $9,317.22. R. 46-47.

That thereupon O'Neal made to Dawson a bill of sale for said cattle, and Dawson executed his note to the Plaintiffs and the bank for $19,033, and Plaintiffs and the bank gave O'Neal a receipt for said amount. R. 47.

That O'Neal then failed and refused to secure in any way the disputed amount of Plaintiffs' claim against him, and failed and refused to carry out and consumate said agreements.

"*And thereupon the parties to said agreements were remitted to their original rights and liens, and the said agveements thereby became abrogated and were thereafter of no force or effect * * and from and after the refusal of the said O'Neal to secure said disputed amount of your orators claim,*

as stipulated in said agreement, your orators have ever treated said agreement as abrogated, abandoned and of no effect." R. 47.

That prior to March, 1880, O'Neal, Dawson and the City National Bank combined and confederated together to cheat, wrong and defraud Plaintiffis, for that at and prior to the execution of said agreement the said parties were in Fort Worth consulting together about said matter, and had partly prepared said agreements when they sought Wm. Hunter, one of the orators' agents, and proposed to him to enter into said agreement. Said agent immediately took the advice of your orators' attorney, A. T. Watts, who advised against making said agreement, on the ground that the lien of your orators on the O N stock was the prior lien, and that he was informed there was enough cattle in said brand to pay Plaintiffs' debt. That on this advice Plaintiffs refused to enter into said agreement and so stated to the bank, O'Neal and Dawson; whereupon the bank, O'Neal and Dawson had a private consultation *not heard by Plaintiffs*, after which O'Neal, in the presence and hearing of the other parties, represented to Plaintiffs that he owned a large number of cattle then reunning in the range in Van Zandt county which were included in the bank's lien and not in Plaintiffs', quite or nearly sufficient to discharge his indebtedness to the bank, and that if Plaintiffs would enter into said agreements said cattle should be embraced therein and included in the delivery to Dawson.

That these representations made by O'Neal were accepted and adopted by the bank and urged by it as an inducement for Plaintiffs entering into said agreements.

That Plaintiffs were not informed of the number, value or condition of said cattle not in the O N brand, which it

was claimed were included in the bank's lien, and knew nothing of the facts with regard thereto, except as represented by O'Neal and the bank. R. 48.

That Plaintiffs, wholly relying on said representations and believing them to be true, were thereby induced to and did enter into said agreement with O'Neal, Dawson and the bank. Said representations were entirely false, fraudulent and untrue, and were known so to be by said parties at the time they were made by them—that they were knowingly made with intent to induce Plaintiffs to enter into said agreements. In fact, said O'Neal did not have or own anywhere any cattle other than said O N stock, except a very few head, not exceeding five hundred dollars in value, and some ten cows and calves of little value and mostly exempt from execution.

O'Neal and the bank well knew such to be the fact at the time said false representations were made by them. R. 48.

That O'Neal, the better to enable him to perpetrate said fraud, and with intent to cheat Plaintiffs, had up to and at the time of entering into said agreement, frequently acknowledged to Plaintiffs that $16,300.00 of their claim against him was correct, and that he owed them that amount as shown by his own books.

That O'Neal promised to meet Plaintiffs, at Dallas, a few days after the date of said agreement and fix the amount of his said indebtedness. O'Neal failed and refused to meet Plaintiffs and postponed such settlement from time to time until after the cattle were delivered to Dawson, when he for the first time disputed about $8,700.00 of Plaintiff's claim. When O'Neal disputed $8,700.00 of Plaintiff's claim he said he owned a large

number of cattle still on the range in VanZadt county, more than sufficient to pay said amount, and that they could be gathered in a few days. R. 49.

After the execution of said instruments between the parties, Plaintiff's attorney having begun the preparation of a deed of trust from O'Neal to secure said disputed amount, called upon O'Neal for a description of the property to be embrrced by the lien, which O'Neal said it was impossible for him to give and that it would have to be obtained from Canton, fifteen miles distant.

O'Neal then and there proposed to pay Plaintiffs something over $4000.00 in addition to the amount assumed by Dawson, and insisted upon his proposition being submitted to Plaintiffs, O'Neal well knowing, that being Saturday, that no reply could be received before Monday, and he then stated that if Plaintiffs declined said proposition he would meet them in Wills Point on the following Wednesday and pay or secure said debt.

During all this time Dawson was very urgent asking that the papers which he was to sign should be prepared, and he signed said papers and left Wills Point knowing O'Neal had not completed his part of said agreement.

Plaintiffs rejected the $4000.00 proposed and met O'Neal at Wills Point the following Wednesday when the proposed arbitration was postponed until Saturday on account of the absence of material witnesses, on which day the parties again met and O'Neal refused to proceed with the arbitration or to secure the disputed debt, and stated that he had no property with which to secure said debt, and said that he owned only a very few cattle besides those he had delivered to Dawson, and he also said that all of his property was mortgaged for much more than its value—that much of it was of doubtful title and then in

litigation, and he asked Plaintiffs not to press him with a suit as he was insolvent and it would ruin him; to all of which Plaintiffs replied that they would take such course as they thought best to protect their rights. R. 50.

Plaintiffs charge that O'Neal was hopelessly insolvent when he delivered said cattle to Dawson. That after said delivery to Dawson he owned no other cattle except about 300 head of said O N stock not exceeding in value $3000.00 and included in Plaintiff's bill of sale.

O'Neal well knew the falsity of his statements, and made them in furtherance of the combination aforesaid between him and the bank and Dawson to cheat Plaintiffs.

O'Neal's acts and representatives subsequent to the Dawson delivery were with the view of delaying Plaintiffs while Dawson hastily drove the cattle out of Texas, which Dawson was proceeding to do with the same fraudulent purpose. Plaintiffs relied on O'Neal's representations until he informed them to the contrary.

That all of the cattle delivered by O'Neal to Dawson belonged to the O N stock and were included in Plaintiff's bill of sale, and he did not deliver to Dawson any cattle in the other marks and brands mentioned in the bank's mortgage.

That long after the execution of the bill of sale to Plaintiffs, O'Neal, without the knowledge or consent of Plaintiffs, sold for about $3000.00 and converted the amount to his own use. *All of which tends to show the animus that characterizes the acts of O'Neal in the premises..*

Wherefore your orators say and charge that on account of the deceit and fraud of O'Neal, Dawson and the bank, the said agreements dated March 20th, 1880, were and are null and void.

That said Dawson, while on the drive failed to account

to McCullough for $218 of a certain sale made by him in disregard of the terms of said agreements. R. 51 and 52.

That while en route Dawson disposed of part of the O N stock in the absence of McCullough, and received in exchange therefor about 30 head of yearlings of the value of $300 and was proposing to dispose of the said yearlings without accounting to McCullough when he was stopped by the levy of the writ of sequestration. R. 52.

That after Dawson replevied said cattle he sold them for $16,500.00 which he received and now holds. R. 52.

Plaintiffs pray a decree against O'Neal for the full amount of their said debt against him.

For a foreclosure of their lien against O'Neal, Dawson and the bank.

If mistaken as to their remedy they pray for a decree against Dawson and the bank for the amount of money coming to them from the proceeds of said cattle under and by virtue of said agreements and for general relief. R. 52.)

DEFENDANT O'NEAL'S PLEADINGS.

O'Neal in addition to his plea to the jurisdiction relied upon his answer filed in the State Court.

After his death his administrator, Mary O'Neal, appeared. R. 83. She relied upon the pleading filed by her interstate.

O'Neal's answer contained a general denial which was allowable under the state practice and put plaintiffs upon proof of their case. R. 17.

He further answered that the notes declared upon by Plaintiffs, if executed by him, were executed for the purpose alone of securing a margin of credit from Plaintiffs,

and no other consideration passed from Plaintiffs to Defendant for the execution of said notes. R. 17.

That on the 11th of September, 1879, O'Neal shipped to Plaintiffs in St. Louis, as his commission merchants, for sale 122 head of cattle of the aggregate value of $2,860.40 which were converted by Plaintiffs to their own use and never accounted for to said Defendant. R. 17.

That part of the Plaintiff's claim is an item of $665.99 pretended loss on cattle sold for Defendant, but that Defendant is not chargable with such loss, because it was occasioned by Plaintiffs wrongfully and without Defendant's knowledge, shipping a lot of his cattle East to market. R. 17.

That certain specified items of interest charged in Plaintiffs' account aggregating $2,164.69 are incorrect. R. 18.

That Plaintiff's charge of $2,500 for a draft drawn by Wm. Hunter on Plaintffs 24th of June, 1879.

Also, the sum of $18,898.25 charged for drafts drawn on Plainfftis by said Wm. Hunter on the 8th day of August, 1879, and,

Also, items of $652.52 for draft drawn by said Wm. Hunter on 5th December, 1879, are all incorrect, because Defendant never authorized said Wm. Hunter to pay any of said sums for the account of Defendant or anybody else, and he has never in any way ratified or authorized their payment by Plaintiffs. R. 18. That when said drafts were drawn and paid, said Wm. Hunter was the agent of Plaintiffs and they were drawn and paid without the knowledge or consent of Defendant O'Neal. R. 18.

That the item of $111.50, date July 8, 1879, is incorrect for $100.

That the item of $102.50, claimed to have been paid to shippers, beginning May 5, 1879, and closing December

3, 1879, is incorrect, because Defendant did not authorize the payment of the whole or any part thereof.

That item draft by Wm. Hunter, due August 28th, 1879, bills payable accepted $6,724.41 is incorrect, because Wm. Hunter was never authorized to draw said draft, nor were Plaintiffs ever authorized to pay the same. R. 19.

That Defendant claims credit for $400 paid to John G. Moore for four months' service, one-half of which Plaintiffs promised to pay. R. 19.

That Defendant is entitled to credit of $9,317.22 on account of the sale of cattle to Dawson on 22d May, 1880, and the credit of said sum then by Plaintiffs to Defendant. R. 20.

That he is entitled to credit of $1,668.50 on account of payment made to Plaintiffs May 22, 1880, by John Dawson through H. E. McCullough. R. 20.

That he is entitled to credit of $1,842 on account of payment made Plaintiffs by John Dawson through H. E. McCullough on 26th May, 1880. R. 20.

That after the execution of said notes Defendant O'Neal shipped to Plaintiffs as his commission merchants, to be sold by Plaintiffs in St. Louis in due course of trade and for their highest market value a large number, to-wit: 7,868 head of cattle worth $30 per head, and aggregating value of $23,644, which cattle were received and appropriated by Plaintiffs, and for the proceeds of which Plaintiffs ought to be held to account. R. 21.

That Plaintiffs, for the purpose of cheating and defrauding Defendant O'Neal, sold a large number, to-wit: 3000 head to the Beef Canning Company of St. Louis, in which company Plaintiffs owned a large interest, to-wit: three-fifths of the whole. That said cattle were sold to said company for less tahn their real value and for less than

they would have sold for in St. Louis market, whereby Defendant was damaged $5,000. R. 21.

That Plaintiffs are estopped by their proceedings and acts aforesaid from maintaining this suit against defendant O'Neal, who prays for an abatement of plaintiffs' claims, for judgment for his own claims and for general relief. R. 21.

JOINT AND SEVERAL ANSWERS OF JOHN DAWSON AND THE CITY NATIONAL BANK. R. 67.

They charge the execution by O'Neal to the bank on 10th December, 1879, of his note for $9,810.11, secured by mortgage on his home stock of cattle branded H and O N, including horses, mares and colts.

That both plaintiffs' and defendant's bills of sale were unintended to be mortgages. R. 68.

That plaintiffs had better means of knowing O'Neal's financial condition and the number and character of his stock than had the officers of the bank, and in all their transactions with him acted and relied on their own knowledge of him and his property. R. 69.

That it was at the special instance and request of plaintiffs that the bank advanced O'Neal the money out of which his indebtedness to it grew, and plaintiffs promised to pay the same. R. 69.

It is true that the bank threatened to institute suit for the purpose of testing the validity and priority of its own and plaintiffs' liens. R. 70.

It is true that at the time the contentions arose O'Neal's cattle were running on their accustomed range in Van Zandt county, but they were not liable to stray or to be lost or stolen to any considerable extent, and they were safer and could have been protected there at less expense

than in Montague county, where a few days later they were caused to be seized at the suit of plaintiffs. R. 70.

That defendants believe that the motives that induced plaintiffs to enter into said agreements were their knowledge that they had not in fact a debt against O'Neal of near the amount claimed by them and they had doubts about the validity as well as fairness of their transactions with him. And because the bank's lien included property not embraced in plaintiffs' and because they knew they were primarily liable to the bank for the payment of its debts against O'Neal. (R. 71.) And because by entering into said agreements they would not only relieve themselves from responsibility for the bank's debt, and of a controversy with the bank as to the validity of their lien on the O N brand of cattle, but they obtained an equal lien on valuable property that they had no lien upon before, and provided for the collection without loss of the uncontested part of their debt against O'Neal, without surrendering the disputed part. R. 71.

They deny that the reservation in said agreement, as to the effect of recitals therein, were intended to have the operation claimed by plaintiffs, and they say they were intended to have no force, except the transactions then contemplated should fail to be consummated, in which case said agreements would have nothing to operate upon. Said agreements were intended to operate on the sale from O'Neal to Dawson, and not independently of it. And when afterwards on 22d of May, 1880, said trade was perfected said agreements took final effect. R. 71.

Defendants then set out the terms and circumstances attending the execution of the various agreements at Fort Worth on March 20, 1879, and the labor and expense gone to and incurred by Dawson and O'Neal in gathering the cattle

and penning them at Wills Point for the purpose of finally consumating said agreements, and the various transactions at Wills Point on the 22d May, 1880, including the delivery of the cattle to Dawson and bill of sale to him by O'Neal for the cattle. The execution of Dawson's note for the cattle and its acceptance by Plaintiffs and the bank—the payments made on it by Dawson through McCullough, and the acceptance and divisions of the first payment by the bank as well as the circumstances of the appropriation of the whole of the second by Plaintiffs. R. 71, 72, 73, 74, 77, 80, 81.

Defendants deny that the two agreements, one between O'Neal, the bank and Hunter, Evans & Co., the other between Dawson, the bank and Hunter, Evans & Co., both executed at Fort Worth on the 20th of March, 1879, are parts of each other in the sense that all of the provisions of one are provisions of the other, according to the legal rule that agreements between the same parties, about the same transaction, executed at the same time, are to be construed as one instrument, because they say said two agreements were not between the same parties, there being in each found one party wanting in the other, and wanting one party found in the other. R. 74, 73.

The objects of the agreements were double. One was to sell the cattle to Dawson free from every lien before existing against them, and charged with a new lien or trust to be enforced through the agency of H. E. McCullough. The other was to provide for settlements between some but not all of said parties. R. 75.

Wherefore separate and distinct agreements were entered into, each relating to separate and distinct obligations and purposes.

That the introduction of Dawson, a new party, and

having no connection with previous transactions made necessary separate and distinct agreements. R. 75.

That statements in amended bill of the substance of the two agreements are in the main correct, but the interpretation and construction thereof as well as the inferences' deductions and conclusions of Plaintiffs are fallacious and unauthorized.

That by said agreement of March 20th, 1879, and the subsequent execution thereof, and the purchase of said cattle by Dawson, the original liens of Plaintiffs and the bank on the cattle sold Dawson were forever extinguished and said new lien substituted therefor. R. 75.

That Plaintiff knew before the delivery of said cattle to Dawson the exact amount of their debt that was disputed by O'Neal. R. 76.

That the haste charged by Plaintiffs to Dawson is explained by the fact that his object in purchasing the cattle was to make profit by selling them again and in fulfilling contracts of sale previously made by him which made it necessary for him to drive the bulk of said cattle out of the State as was known to Plaintiffs. That punctuality and dispatch were of material importance, and twelve days beyond the time of performance mentioned in said agreements had already elapsed to his injury.

Wherefore, having executed his part of the agreements and become the owner of the cattle, he at great labor, risk and expense, with the knowledge and consent of Plaintiffs, commenced to drive said cattle to their destination out of the State of Texas and through Montague county. R. 76.

Defendants charge that at the date of said delivery to Dawson' O'Neal owned a large number of cattle not included in the sale and delivery to Dawson which he was

willing and then offered to deliver to Dawson upon the same terms and for the same purposes that the others were delivered to him, if the time required for their being gathered was allowed, but Plaintiffs, being satisfied, agreed that the cattle then gathered should be delivered. R. 77.

That at the time of said delivery to Dawson, O'Neal owned of the O N stock on the range in Van Zandt county, besides those delivered to Dawson, as many as 350 head of the value of $5,250, as Plaintiffs well knew, and which were seized a few days afterwards by a writ of sequestration wrongfully sued out by Plaintiffs. R. 78.

That at the date of said sale and delivery O'Neal was solvent and owned real estate sufficient, over and above every other encumbrance upon the same, to pay more than said disputed debt of $8,500, and on the 22d of May, 1880, he placed in the hands of his attorneys his title papers for the same with instructions and for the purpose of his preparing a mortgage on said lands to secure the ultimate payment of the disputed amount when found due, but the execution of such mortgage was prevented by the demand of attorneys of Plaintiffs that such mortgage should include a power of sale for cash in ten days after the amount due was ascertained, which was declined by O'Neal's attorney because that was not required by the agreement and was arbitrary and unjust, and would lead to a sacrifice of the property. R. 78.

That O'Neal was anxious to give Plaintiffs security, and repeatedly offered to do so, but Plaintiffs, by their attorney and agent always refused to take such security uncoupled with authority to foreclose in ten days, and they threatened, unless he submitted to their exactions, to immediately cause him to be sued and his property to

be seized and sold, and it was in reply to such demands and threats that the attorney of O'Neal, and not O'Neal himself, and not in his hearing or with his knowledge, retorted that Plaintiffs could not accomplish anything by that course because O'Neal was insolvent and his property was mortgaged beyond its value, etc. R. 78.

Said statements Plaintiffs could have easily ascertained to be a delusion by investigation and by examination of the records. They were not the cause of the failure of negotiations between Plaintiff and O'Neal. The real cause of each failure was that Plaintiffs had conceived their purpose of seizing Dawson's property in a distant county under circumstances that they believed would lead to its being surrendered to them rather than suffer the damages, delays and losses that they believed would otherwise be caused to Defendants. R. 79.

Defendants say it is true that for several days before the 20th of March, 1879, Dawson and O'Neal were discussing the sale of said cattle to Dawson, and it being found necessary to have the consent of the officers of the bank, as well as Plaintiffs, conversations were held between O'Neal, Dawson, the officers of the bank and Plaintiffs' agents, but nothing was at any time said or proposed by any of the parties with regard to deceiving, taking advantage of, or injuring in any way the Plaintiffs herein. And if O'Neal had any purpose, or in any manner, or by any means contemplated, intended, or tried to deceive Plaintiffs, or either of them, or to get any undue advantage, such purpose was never communicated to either of these Defendants, and never came to their knowledge, but on the contrary they believed and had every reason to believe, that O'Neal was acting and intended to act with the utmost good faith towards Plaintiffs. The only

declarations made by O'Neal in their presence or that ever came to their hearing were that he intended to, and had the means of securing Plaintiffs all that he was justly oweing them. R. 81.

Defendants deny that previous to or at the date of said agreement the bank or its officers had any knowledge of the number, value or situation of the cattle owned by O'Neal further than O'Neal's statements to them. That neither said bank or any of its officers, or agents, ever at any time pretended or represented to Plaintiffs or either of them roto any agent of theirs, that said bank or any of its officers or agents had any such knowledge ; and they say it is not true that they or either of them deceived or caused to be deceived Plaintiffs, or either of them in any respect, but the fact is that Plaintiffs, even with the advice of their attorney were not convinced that their debt as it stood was secure. They did not enter into said agreement with unselfish motives merely to please the bank, but to better their own condition, and persisted in it after mature reflection and after they had seen the cattle sold by O'Neal to Dawson. R. 81.

Defendants deny all allegations charging them with collusion to get possession of said stock of cattle or to get said agreements executed before there was a final settlement between O'Neal and Plaintiffs. They deny that Dawson ever disposed of any of the cattle otherwise than as he was authorized to do by said agreements and as the owner thereof. R. 82. Or that he even deceived McCullough in any respect.

That Plaintiffs failed to make the bank a party to their suit in the District Court of Montague county, and brought their suit in that county, where they knew none

of the Defendants lived, and in a Court which they knew had jurisdiction, neither of the property in controversy or of the persons of the Defendants, intending by reason of inconvenience to said Dawson and the want of pecuniary ability by the Defendants to prevent their replevying said cattle and to make them submit to irretrievable damage or to a settlement on Plaintiffs' own terms.

Defendant Dawson charges that Plaintiffs, by their wrongful seizure of said cattle by the writ of sequestration, damaged him in the sum of $5,000, for that relying on the acts and declarations of Plaintiffs he employed hands to drive and herd said cattle at an expense of $1000;that he incurred further expense, and was himself at great trouble and labor in driving said cattle from Van Zandt to Montague of the value of $1000; that at the time of their seizure in Montague he had said cattle contracted to be sold at a profit of $3000. And that he has been damaged by reason of the malicious suing out of said writ of sequestration in the further sum of ten thousand dollars, for which he asks punitory damages. R. 31.

On the 18th day of May, 1885, the Circuit Court entered its final decree in substance as follows: R. 285.

1. Overruling Defendant's exceptions to the jurisdiction of the Court.

2. Overruling Defendant O'Neal's plea to the jurisdiction based on the fact that none of the Defendants resided in Montague county when this suit was instituted, and said plea being heard and the evidence advanced in support of the same,it was considered that said plea be overruled.

3. Deciding that Dawson's note be divided between Plaintiffs and the City National bank pro rata, according to their actual demands against John A. O'Neal, and

finding that on May 22, 1880, O'Neal was indebted to Plaintiffs $18,333.68, and to the City National bank $10,339.85, and that Plaintiffs were at said date entitled out of the Dawson note to $12,169.64, less the sum received by them of the proceeds of said note, to-wit - On May 22, 1880, $1,668.49; on May 26, 1880, $1,842. And decreeing that Plaintiffs recover of the Defendant John Dawson and the sureties on his replevy bond, John Nichols, S. W. Lomax, W. J. Boaz, J. F. Ellis and W. Scott, the sum of $8,659.15, principal and the sum of $4,329.67 interest, making a total of $12.988.82, which bears interest from date of judgment at the rate of ten per cent. per annum and all cost of collecting the same, for which execution was directed to issue at the expiration of ten days from the date of the decree.

And further, that Plaintiffs having received $2,424.56 from cattle sequestrated and replevied by them, of which sum the City National bank is entitled to $1,311.50, it is decreed that the bank recover of Plaintiffs said sum for which execution may issue at the end of ten days.

It further appearing that Defendant O'Neal replevied $110 worth of cattle sequestered on 20th July, 1880, it was decreed that Plaintiffs recover of Mary O'Neal, administratrix, W. G. Criswell, L. J. Bridges and F. C. Wells, sureties on replevy bond, $110 with interest at 8 per cent. per annum from July 20, 1880, and cost of collection, for which execution was directed to issue after ten days, the proceeds of said collection to be distributed pro rata between Plaintiffs and the bank.

It was further ordered that Plaintiffs recover of and from the estate of John O'Neal $4,613.81, and all costs of suit, less any sum that may be received by Plaintiffs from the execution to be issued against the sureties of said

O'Neal as therein provided, to be paid in due course of sdministration.

In the meantime providing that the cost of suit he paid pro rota by Plaintiffs and the bank.

FIRST.

It will be observed that no appeal was taken by Mrs. O'Neal, the administratrix of John O'Neal, deceased, from the final decree of the circuit court, and Appellees insist that Appellants Dawson and the bank will not be heard upon the questions sought to be raised by their first assigned error.

Crittendon vs. Brewster, 2nd Wall 191.

But if otherwise Appellees would reply that every item of Appellee's account against O'Neal was abundantly established by the evidence of F. W. Flatt's R. 118-125, of J. B. F. Sampsel, R. 146, etc., Wm. Hunter, R. 127, etc., R. D. Hunter, R. 83, etc. Also O'Neal's letter, R. 184-185. That the items of interest charged in this account were so charged in accordance with the usages of the trade in East St. Louis where the business was transacted, and known in part at least to O'Neal, and not objected to by him at the time. It is insisted that the statute of Texas regulating interest cited by Appellants have no application in this cause, for that the business was transacted outside of the state.

An examination of the account will show that all items of interest therein charged was on over drafts, money advanced, or notes of O'Neal discounted and afterwards paid by complainants.

SECONDLY.

As to the second assigned error Appellees insist that the court did not err in the pro rata decree of the pro-

ceeds of the cattle to the injury of Appellants. The several agreements executed at Fort Worth, March 20, 1880 (R. 56-58, and R. 251-252) were parts of one and the same agreement, and each dependent upon the other, and is to be taken and construed as one contract and agreement. Teal vs. Walker, III U. S. R., 242, etc. It is clear from the stipulations in the several instruments, as well as the evidence found in the record, that they were all executed at the same time, related to the same subject matter, and had in view the consumation of the one transaction. Throughout the case Appellees entertained and urged the theory that when O'Neal fraudulently disputed about one half of the claim of Appellees against him, and then refused to secure the disputed amount, that then the agreements had failed and the parties were remitted to their original rights. And it is most respectfully submitted that when these agreements are construed in the light of the attending circumstances as shown by the evidence, that the conclusion is inevitable, each stipulation contained in them, and each and every part is dependent upon each and every other stipulation and part of said agreements, And that the refusal of any one of the parties to comply with the stipulations, upon his or their part abrogated said agreements and that the parties were thereby remitted to their original rights and liens. And it was upon that theory that Appellees sought a foreclosure of their lien as the prior lien upon said cattle, and to have the proceeds applied to the payment of their debt against O'Neal.

However, the Circuit Court did not entertain that view of the cause, but holding in accordance with the evidence that O'Neal, in disputing so large a portion of the claim of Appellees, and then refusing to secure the same in ac-

cordance with the agreement of the parties, acted in bad faith, and in fraud of the rights of Appellees, and in violation of the agreements the court was of the opinion and so held, that as between the bank and Appellees, that the agreements should be enforced according to their true intent, that is the proceeds of the cattle were pro rated between them according to the amount of their respective claims justly due to each party by O'Neal.

While this disposition of the cause as between the bank and Appellee is believed to be erroneous, yet it is not an error resulting in injury to the bank, but on the contrary an error from which it derives a decided advantage of which it will not be heard to complain.

It is again submitted that when O'Neal disputed so large a portion of Appellees' claim, that he acted in bad faith and with the intent to defraud them of their rights. By his letter to them of February 15th, 1880, he admitted an indebtedness to them of $16,300. During the same month he admitted about the same amount as just. R. 136. He had previously admitted the justness of the entire claim. R. 112, and also R. 88. It was only after he had failed to obtain further advancements from Appellees that he disputed any portion of their claim, and then only to the extent of $2000. And after the delivery of the cattle to Dawson he for the first time disputed about half of Appellees claim, and then by tricks and devices attempted to delay them with reference to a settlement of the matter and the securing of the same until the cattle could be driven into the Indian Territory, where they would have been beyond the reach of civil process, and finally refused to secure the disputed amount in any way. See evidence of Lewis Evans R. 100, etc. Also evidence of H. E. McCullough R. 278, etc. Evidence of Kearby and

O'Neal, R. 248. Also evidence of A. T. Watts R. 140, 141, 142 and 143. Clearly O'Neal attempted to perpetrate a fraud upon Appellees, and refused to comply with or carry out his part of the contract. Then, in the language and spirit of the agreement, it not being consumated, the parties were remitted to their original rights and liens.

That Appellee's mortgage on the O N stock of cattle was superior and prior to that of the bank, admits of no question. In the bill of sale from O'Neal to John Nichols, dated December 10th, 1879, (R. 225) it is stipulated with reference to the O N cattle, that it is "subject to a bill of sale of the above described property to Hunter, Evans & Co., now on record in Van Zandt county." The claims of the bank against O'Neal accrued about the middle of November 1879. R. 194. Therefore the bill of sale to Nichols was given to secure a pre existing indebtedness and was taken with notice of Appellee's bill of sale. A chattel mortgage not recorded under the statute of Texas cited by appellants, is only void as against purchases and mortgages in good faith.

Brothers vs. Mundell, 60th Texas, 246.

Keller vs. Smalley & Harris, 63d Texas, 519.

Overstreet vs. Manning, 67th Texas, 660, etc.

See also People's Savings Bank vs. Bates, 120 U. S. R. 556.

While it is believed that Appellees were entitled to a decree of foreclosure and the application of the proceeds of the stock of cattle (represented by the replevy bond) to the payment of their claim against O'Neal, they have acquiesced in the final decree, and have not complained of that which they believed to be an error resulting in their injury.

This view of the cause is independent of the question of fraud raised by the bill going to the execution of the con-

tracts of March 20, 1880, and about which their is a conflict in the evidence.

It is submitted that upon a full and fair consideration of all the evidence, and the subsequent acts and conduct of the parties, as developed by the record, that the testimony of the witnesses for Appellees upon that issue is entitled to full faith and credit, and sufficiently establishes the fraud charged in the bill. A majority in numbers of the witnesses on that issue, it is true, are with the Appellants, but upon this and other issues in the cause there is more or less conflict among them.

The evidence of Wm. Hunter (R. 129, 130) is direct and positive that O'Neal did represent to him that he, O'Neal had enough cattle outside of tho O N brand to secure the indebtedness to the bank, and that he was induced thereby to enter into the agreements. And the evidence of A. T. Watts is equally positive and direct as to such statement by O'Neal or his attorney, and that upon the faith of such statements he advised Wm. Hunter to make the agreements. While McCart (R. 211 and 112) says that he had no knowledge of Watts' advice to Plaintiffs not to enter into the agreements. He adds, "I know that O'Neal said that he had at home other cattle besides the O N brand, and that he had cattle enough to pay Plaintiff's debt and the bank's debt." The witness in that connection says: "The rights of both the Plaintiff and the bank was discussed and argued at great length by us all," while the evidence all shows that Watts arrived at Fort Worth about 3 o'clock p. m., and that the several agreements were prepared and signed that evening. Upon this point Kearby says: "I heard O'Neal say, and probably I repeated it, that he believed he had and could get cattle enough to pay both debts, etc. O'Neal and myself urged that there

were cattle enough, we believed, to pay the bank and Hunter, Evans & Co., my statement being based upon what O'Neal had told me." R. 246. In that connection O'Neal says: "As soon as Watts came the contracts were closed up in a very short while, and without objections from Watts, as far as I know no such statements was made or urged that I know of." R. 246. From this evidence it is certainly true that statements were made and urged by O'Neal and Kearby as to the number and value of O'Neal's cattle upon that occasion. And that these statements were made and urged with the view and for the purpose of inducing Appellees' agent to enter into the agreements. Obviously there was some hesitation upon the part of Wm. Hunter as to the agreements, and it is equally true that Watts advised against the adjustment until he was satisfied by the representations of O'Neal and Kearby. Watts knew that Appellees' lien was the superior and prior lien upon the entire stock of O N cattle, and it is not to be supposed that he could have been induced to yield that advantage on account of any vague or uncertain representations made by O'Neal and Kearby. It is more reasonable to assume that the transaction was as stated by Watts and Hunter, and that the execution of the agreements by Appellees' agent was induced by the fraud of the other parties.

And if that be true certainly the Appellees were entitled to a cancellation of the agreements and a foreclosure of their lien upon the O N cattle.

THIRD.

By their third assigned error Appellants claim that the court erred in not allowing Dawson damages for the seizure of the cattle in Montague county.

Had the agreements been consummated, still Dawson's purchase was subject to the liens of Appellees and the bank, and his holding was in trust for them.

But as heretofore insisted, when O'Neal refused to secure the disputed amount of the Appellees' claim the agreements failed, and Appellees were entitled to subject the cattle to their lien, and it is not contended but at the time of the seizure Dawson was driving the cattle out of the State and into the Indian Territory, where no civil process could have reached them. His purchase was conditioned upon the consummation of the agreements by all the contracting parties, and certainly O'Neal's refusal to comply with his stipulations, left Appellee's in a condition where they could alone protect themselves against irreparable injury by a resort to the courts and process of seizure.

Aside from this view of the question the evidenee clearly shows that Dawson violated his agreement and perpetrated fraud upon Appellees.

McCullough says Dawson sold $2,060 worth of the cattle to Frank Houston and retained $218 of the proceeds and only accounted to him for $1,842. R. 279. Dawson, in the absence of McCullough, exchanged cows for heifers getting one two-year-old heifer and two dollars in money for each cow, and failed to account for the money and evinced a disposition to claim the heifers. See McCullough's evidenee. R. 280 and 281.

The cattle were seized June 2, and held until June 6, 1880, four days. R. 281. The swollen condition of Red River would have prevented the crossing of the cattle until after they were replevied, and none of them were

lost while held by the sheriff. R. 281, 283. See also R. 148; also R. 120.

If the seizure had been wrongful and made under circumstances which would otherwise have entitled Dawson to damages, still the evidence shows that there was no damage occasioned by the seizure to Dawson.

FOURTH.

The fourth ground of error relied upon by Appellants is that the court erred in overruling Defendant's plea to the jurisdiction of the District Court of Montague county, and to the jurisdiction of the United States Circuit Court at Dallas.

O'Neal alone plead in abatement to the jurisdiction of the State Court, and his administratrix did not appeal, and it is submitted on the authorities heretofore cited that Appellants will not be heard to question the correctness of the ruling of the Circuit Court upon O'Neal's plea in abatement.

Dawson's answer in the State Court did not question the jurisdiction of that court. Art. 1262 Revised Statutes of Texas, provides that, "The defendant in his answer may plead as many several matters, whether of law or fact, as he shall think necessary for his defense, and which may be pertinent to the cause; provided, that he shall file them all at the same time, and in the due order of pleading."

Construing the above article the Supreme Court of Texas holds that a plea to the jurisdiction as to the person is waived by general denial or pleas to the merits.

Compton vs. Stage Co., 25th Texas, Sup. 67.

Allen vs. Read, 66th Texas, 13.

Dawson first filed in the State Court a general denial, (R. 10) and subsequently he answered to the merits. R. 23, 33.

Unquestionably Dawson waived the question as to the jurisdiction of the person, and will not be heard to raise it in this court.

That question is raised by the bank in the Circuit Court only by demurrer. It is alleged in the original bill (R 2) that the cattle upon which Appellees claimed a lien was then in the possession of Dawson in Montague county. Art. 1198 Revised Statutes of Texas, sub division 11, is as follows: "Where the suit is for the foreclosure of a mortgage or other lien in which case suit may be brought in the county in which the property subject to such lien or a portion thereof may be situated."

Now, if the bank could raise that question in the Circuit Court, which confessedly had jurisdiction of both Dawson and the bank, then it would seem not to admit of question, but that the court properly overruled the exceptions, which admitted the truth of the allegations, that at the time the suit was brought, the cattle were in Montague county in the possession of Dawson.

But Dawson having waived the question of jurisdiction by his answers, the bank not being a party until after the case was in the United States Circuit Court, it would seem that as to the bank the jurisdiction of the court had attached rightfully upon its appearance.

In any event it is certain that the cattle were in Montague county at the time the suit was brought, that is they were situated there for any and all legal purposes.

Attention is respectfully called to section 3, general provisions of the revised statutes of Texas, as follows: "That the rule of the common law that statutes in dero-

gation thereof shall be strictly construed, shall have no application to the revised statutes, but the said statutes shall constitute the law of this state respecting the subjects to which they relate, and the provisions thereof shall be liberally construed with a view to effect their objects and to promote justice"

Construing the provisions of the Texas statutes in reference to venue in the light of that rule, the court could but hold that for the purposes of the suit the cattle were situated in Montague county; any other construction would defeat the objects of the statutes and thwart instead of promoting justice. The provision with reference to jurisdiction quoted above has not been construed by the Supreme Court of Texas with reference to personal property. In Joiner vs. Perkins, 59 Texas 303, it is construed with reference to lien on lands.

It is submitted upon the whole case that there is no error of which Appellants can be heard to complain, and that the decree ought to be affirmed.

SAWNIE ROBERTSON,
Attorney for Appellees.

On the question of jurisdiction see Keely v. Va Protection Ins Co. 3 Hughes C C Rep 306 & 307 & Edwards v Comm. Mutual L Ins. Co. 20 Fed Rep. 45-2